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LEGAL AUTHORITY FOR THE CONDUCT AND CONTROL OF FOREIGN INTELLIGENCE ACTIVITIES

A Commentary on the Summary of Issues

Prepared by William R. Harris for the Commission on the Organization of the Government for the Conduct of Foreign Policy

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John T. Elliff*

November 22, 1974

*Views expressed are solely those of the author, and should not be construed as representing views of the Commission or its staff.

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LEGAL AUTHORITY FOR THE CONDUCT AND CONTROL OF FOREIGN INTELLIGENCE ACTIVITIES - A COMMENTARY

by John T. Elliff*

Part 1 FOREIGN INTELLIGENCE AND GOVERNMENT UNDER LAW

The paper prepared by Mr. Harris is one of the most important and perceptive contributions to the study of foreign intelligence activities in recent years. It strikes the right overall balance between recognition of the nation's intelligence needs and concern for public confidence in the responsible exercise of power. With some modifications, it should be endorsed and published by the Commission. Its analysis and evaluation of the issues would help improve public and Congressional understanding; and its recommendations would, if implemented, strengthen and clarify the legal framework for foreign intelligence activities. Some of the proposals are likely to arouse controversy because they place legislative limits on executive power. Nevertheless, the proposed limits do not seem unduly restrictive in a nation seeking to re-establish the rule of law as a constraint against abuses of authority.

The recommendations may, in some instances, be too permissive with regard to possible infringements of the legal rights of United States citizens. This applies to Issues #2, #3, #7, and #16. Moreover, the paper does not devote sufficient attention to the need to define more clearly the statutory prohibition against the Central Intelligence Agency having "police, subpoena, law-enforcement powers, or internal-security functions."

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There is no clear delimitation of functions between the counter-espionage branches of the foreign intelligence agencies and the F.B.I. which has been directed by Presidential order to "take charge of investigative work in matters relating to espionage."[1] A recently published Justice Department memorandum indicates that the F.B.I. is "normally not involved" in the investigation of matters covered by Paragraph 5, National Security Council Intelligence Directive Number 1, unless the inquiry is focused "within the F.B.I."[2] One former intelligence agency official has described the reluctance of counter-espionage specialists to bring in the F.B.I. because Bureau officials are viewed as "publicity-conscious" and "handicapped by all the rules of evidence."[3] The proposal for an additional ninth National Security Council Intelligence Directive to govern domestic collection of foreign intelligence might address this problem. (See p. 7.)

Rather than attempt to draft such a directive, the Commission should recommend that the President and Congress re-affirm the F.B.I.'s authority as the agency primarily responsible for "internal security functions." There are indications that the F.B.I.'s Intelligence Division - Counterintelligence Branch is developing, in the post-Hoover era, a more sophisticated understanding of the specialized techniques required for successful counter-espionage work.

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[1] Directive issued by President Roosevelt on September 6, 1939, reissued by President Roosevelt January 8, 1943 and reaffirmed by President Truman on July 24, 1950.

[2] Memorandum from the Attorney General to the Director, Federal Bureau of Investigation, Subject: Unauthorized Disclosure of Classified Information to the Press, May 9, 1962.

[3] M. Copeland, Without Cloak or Dagger: The Truth About the New Espionage, 182-183 (1974).

Issue #1: The Commission should in its Report to the President and the Congress reaffirm the fundamental importance of compliance with the laws of the United States in the conduct of intelligence in support of foreign policy.

Compliance with the law contributes to the effectiveness of American foreign policy because public confidence in the institutions of government is thereby sustained. Law is perhaps the most valuable resource for maintaining the legitimacy of public policy in the United States. Conversely, disregard of the law can undermine support for vital national security programs, especially in the intelligence field. Government under law is also the bond which holds together the domestic social fabric.[1]

On at least three recent occasions, one or more foreign intelligence agencies have engaged in conduct of questionable legality. In 1970 the entire foreign intelligence community endorsed the surreptitious entry and illegal mail intercept features of the so-called "Huston plan." The C.I.A. provided improper assistance to the White House "plumbers" unit in 1971. And in 1972 high C.I.A. officials seemed initially willing to request that the F.B.I. curtail its investigation of Watergate.

Reaffirmation of the need to comply with law would strengthen the capacity of intelligence professionals to resist lawless external pressures. The law should be viewed as protecting legitimate intelligence functions, rather than as an obstacle to be circumvented in pursuit of the national interest.

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[1] "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are dommands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipotent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Justice Louis D. Brandeis, in Olmstead v. United States, 277 U.S. 438 (1928), dissenting opinion.

The issue of the overall legality of foreign intelligence functions delegated under the National Security Act of 1947 is reviewed effectively by Mr. Harris. The language and intent of the Act, plus annual ratification by Congress through post-briefing budget authorizations, constitute sufficient legislative authorization for covert intelligence actions. Wise policy may dictate more precise legislative standards, but the constitutional requirements of the separation of powers are satisfied.[1]

There is greater doubt as to the constitutionality of the provisions of the Central Intelligence Agency Act of 1949 which exempt the C.I.A. from normal controls over expenditures.[2] As noted by Mr. Harris (Issue #14), the courts have declined to consider this issue in a taxpayer's suit. However, the constitutional principle of full disclosure should be given great weight in any consideration of legislative oversight procedures.

From time to time it is asserted that there are exclusive Presidential powers to collect foreign intelligence. Mr. Harris properly rejects this conception (Issue #3, note 19) and recognizes that these powers may be shared by the legislative and executive branches.[3] The National Security Act of 1947 is, of course, a prime example of this sharing of authority.

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1 "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. . . ." Justice Robert H. Jackson, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), concurring opinion.

2 Article I, Section 9, of the Constitution provides: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

3 "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . ." Justice Jackson, op. cit.

Part 2 AUTHORITY WITH RESPECT TO FOREIGN INTELLIGENCE

Issue #2: The Commission should be concerned with standards and procedures for the lawful collection and safeguarding of foreign intelligence acquired within the United States, or concerning U.S. citizens or corporations abroad.

The main reason for concern is the public disclosure that the so-called "Huston plan" in 1970 included the following relevant provisions:

--"coverage by N.S.A. of the communications of U.S. citizens using international facilities;"

--intensified F.B.I. electronic surveillance coverage "of foreign nationals and diplomatic establishments in the United States of interest to the intelligence community;"

--relaxation of restrictions on illegal covert mail coverage "on selected targets of priority foreign intelligence. . .interest;"

--illegal surreptitious entry "to permit procurement of vitally needed foreign cryptographic material;"

--increased "C.I.A. coverage of American students (and others) traveling or living abroad."[1]

Mr. Harris contends that the first item is a legitimate measure to obtain transnational intelligence received in or transmitted from the United States. He rightly observes that safeguards are needed to insure that such intelligence collection does not infringe the legal rights of citizens. Similar interests are at stake with regard to F.B.I. electronic surveillance within the United States and C.I.A. coverage of citizens overseas.

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[1] "Operational Restraints on Intelligence Collection," in Statement of Information, Book VII--Part 1, White House Surveillance Activities and Campaign Activities. Hearings before the House Committee on the Judiciary, 93d Cong., 2d Sess. (May-June, 1974), pp. 438-442.

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COMMISSION ON THE ORGANIZATION OF THE GOVERNMENT
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ORGANIZATION AND ROLE OF CONGRESS IN FOREIGN POLICY: CONGRESSIONAL PERCEPTIONS

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TABLE 1

Role of Individual Members	Role of Congress: Satisfied	Role of Congress: Dissatisfied	
Satisfied	68.2% (15)	31.8% (9)	
Dissatisfied	8.6% (5)	91.4% (53)	n = 94

TABLE 2

Overall View of Recent Foreign Policy	Role of Congress: Satisfied	Role of Congress: Dissatisfied	Role of Executive: Satisfied	Role of Executive: Dissatisfied	
Support	26% (13)	74% (37)	68.2% (30)	31.8% (14)	
Oppose	11.1% (1)	88.9% (8) n = 59	22.2% (2)	77.8% (7) n = 53	

NOTE: The survey data reported are based on a preliminary and partial analysis and should be regarded, therefore, as tentative and subject to revision. Interpretations of findings and any views and conclusions expressed are those of the author alone, and not of any other member of the Commission staff, or of the Commission on the Organization of Government for the Conduct of Foreign Policy or any of its member Commissioners.

Issue #3: Domestic collection of foreign intelligence or transnational intelligence should as noted below be safeguarded by (a) legislatively mandated search warrants of courts of competent jurisdiction; (b) executive promulgation of standards for foreign intelligence collection; (c) legislatively mandated protection from public disclosure, and/or criminal sanctions for abuse of domestic, transnational, or foreign intelligence; and (d) legislatively mandated standards for domestic collection of foreign intelligence.

The Commission should express its concern in this area by recommending that the President and the Congress give careful consideration to the adoption of legislation and the issuance of executive orders which address the following problems. First, any interception of oral or wire communications within the United States or directed at U.S. citizens overseas must satisfy the "search and seizure" standards of the Fourth Amendment. Wiretapping and electronic eavesdropping are the most intrustive forms of surveillance, recording as they do every casual remark and expression. This writer believes that a prior judicial warrant procedure can be devised which would not unduly interfere with vital foreign intelligence collection within the United States or regarding U.S. citizens overseas.[1]

Second, assuming that burglaries and illegal opening of the mails are no longer seriously considered, other forms of intelligence gathering within the United States do not raise major constitutional problems. Wireless electronic communications may be intercepted; informants may be recruited; undercover agents may be planted; public record information may be compiled; interviews may be conducted. These and similar techniques may be used at home or abroad without infringing the rights of citizens subject to legitimate inquiry.

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[1] J. Elliff, "Electronic Surveillance for National Security," New York Law Journal, June 5-7, 1974.

However, wise policy may dictate careful limits on such measures when they are aimed at U.S. citizens. The ban on the C.I.A. performing "internal security functions" is one example. Thus, Mr. Harris properly suggests the need for a ninth National Security Council Intelligence Directive delimiting the scope and procedures for domestic collection of foreign intelligence.

Third, legislation may be required to establish legal safeguards against the misuse of intelligence information. Recent investigations have discovered examples of the partisan use of national security intelligence information obtained through electronic surveillance.[1] Intelligence gathered for legitimate purposes should be protected by statute from use for any other purpose unrelated to national security.

Fourth, in his discussion of Issue #12 (note 48), Mr. Harris cites proposed amendments to the National Security Act of 1947 to authorize various domestic functions of the C.I.A. in support of its foreign intelligence mission. Such legislation would be unnecessary if the additional NSCID discussed above were issued.

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[1] "In or about January 1970 H. R. Haldeman and John Ehrlichman permitted the information contained in one of the summaries of the 1969-71 wiretaps to be used in connection with political action in opposition to persons critical of the Administration's Vietnam policy." Statement of Information, op. cit., at p. 20.

Issue #4: The Commission should not recommend new legislative authority for CIA or other USIB agencies to collect, disseminate and protect foreign intelligence of commercial value.

Although this subject is not explicitly mentioned in the National Security Act of 1947, it might come within the broad interpretation of "other functions and duties related to intelligence affecting the national security." Any dissemination of information to private firms should occur only when necessary to protect the national security, not simply to grant commercial benefits to U.S. firms.

Issue #5 -- see discussion of Issue #15.

Issue #6: The Commission should recommend legislative authorization and confirmation by advice and consent of the Senate of the Defense Intelligence Agency and its Director.

Such action would improve the conditions for legislative oversight. It should be noted that the position of F.B.I. Director was not made subject to confirmation by the Senate until 1968. Care should be taken not to derogate the authority of the Director of Central Intelligence.

Issue #7: The Commission should not recommend supplemental legislative authorization of the National Security Agency, but should recommend confirmation of its Director by advice and consent of the Senate.

Senate confirmation of the Director is again valuable to insure adequate responsibility to the Congress. However, the need for supplemental legislative authorization is not clearly demonstrated, since there are serious doubts as to whether transnational intelligence regarding U.S. citizens and corporate activity abroad should be gathered through the communications interception facilities of N.S.A.

The fact that N.S.A. has vast capabilities should not be conclusive of the issue. The risks of collecting and storing extensive data about U.S. citizens are demonstrated by the F.B.I.'s past difficulties. An agency's power is magnified and the temptation to misuse the information correspondingly increases. The fears engendered may be more damaging to the nation's political life than the actual abuses of power. There should be no significant exception to the principle that the primary subjects of foreign intelligence agency interest are foreign nations and their citizens, not U.S. citizens or corporations. Overt information-gathering methods must suffice to supply data about American business firms. Secret surveillance, no matter how "non-intrusive," has no place in dealing with the lawful activities of citizens at home or abroad.

The present policies of N.S.A., as described by Mr. Harris, appear to circumscribe these dangers properly. Unavoidable interceptions of U.S. citizen and corporate communications abroad should not contribute to the Agency's data base, but should be destroyed automatically.

Issue #8: The Commission should not recommend legislative delegation of responsibility for new fields of foreign assessment and forecasting.

Mr. Harris rightly stresses that the foreign intelligence agencies are not the only source of expertise in emerging areas of interest. The analysis here leads directly to consideration of Issue #14 with regard to the desirability of widening the intelligence marketplace.

Part 3 CLANDESTINE SERVICES UNDER MUNICIPAL AND INTERNATIONAL LAW

Issue #9: Clandestine services do not constitute a per se violation of the obligations of the United States under international law.

Clandestine operations appear justifiable under international law in at least three different circumstances. First, there may be tacit or even explicit international recognition of the desirability of certain forms of intelligence penetration, as by means of remote sensing equipment and satellite surveillance, to monitor arms control agreements and maintain the stability of international expectations.

Second, a right to retaliatory actions seems to be recognized under the 1961 Vienna Convention on Diplomatic Relations, a treaty ratified with the advice and consent of the Senate in 1972.[1]

The third and most debatable condition applies to intervention by rival powers in a third nation. An emerging principle may be that intervention is justified to counter the intervention of another power. However, this principle may be said to be firmly established only where the original foreign intervention seeks to threaten an existing government, which then requests the counter-intervention.

Issue #10: The Commission should recommend amendment of the National Security Act of 1947 to require, prior to authorization of "other functions and duties," an opinion as to the legality under the laws of the United States and obligations of the United States under international law.

The ambiguities of international law suggest that this requirement would not unduly burden the foreign intelligence community. It would, however,

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[1] The Association of the Bar of the City of New York, "Judicial Procedures for National Security Electronic Surveillance," Federal Legislation Report No. 74-4 (June 24, 1974), p. 17.

provide for a detached analytical evaluation of clandestine operations, from a perspective more likely to take "the long view." Mr. Harris' endorsement of this idea makes a major contribution to the search for reforms which can help re-build confidence in the ability of the foreign intelligence community to exercise its powers with responsibility and wise discretion.[1]

Issue #11: The Commission should not recommend amendment of the National Security Act of 1947 to permit, in the discretion of the National Security Council, delegation of "other functions and duties" to the Director of Central Intelligence rather than to the Central Intelligence Agency.

This proposal misconceives the problem. In practical terms, it would allow the Director of Central Intelligence to authorize the performance of clandestine functions by military services, rather than by an agency like the C.I.A. with a significant civilian orientation. This would be an undesirable departure from the practice of vesting covert operations in a non-military agency.

However, it may be desirable to divide the C.I.A. into two separate agencies, both non-military in character, but one for intelligence analysis and the other for clandestine operations. The advantage would be in removing the taint of "dirty tricks" from the analysis professionals.

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[1] Professor Matthew Holden, Jr., of the University of Wisconsin observes, "The principle issue. . .is whether de-stabilization is wise at a given time and whether it is properly authorized, controlled, conducted, and terminated when it is no longer approved or effective. What we cannot contemplate, in short, is hostile action taken without mature consideration, outside any framework of authoritative political approval, on the notion of some self-initiating bureaucratic nucleus which cannot be called to account." Letter to the Editor, The Washington Post, November 1, 1974.

Issue #12: The Commission should not recommend amendment of the National Security Act of 1947 to require Presidential authorization of any "other functions and duties" under subsection 403(d)(5).

Mr. Harris appropriately points out that this proposal would lead to needless international embarrassment, unless it is meant as an abolition of covert operations entirely.

The latter position is an intellectually and morally defensible one, although not required by prevailing principles of international law. The foreign intelligence community should be willing to face the possibility that the electorate might choose a President committed to refraining from intervention in foreign nations. If this appears the likely outcome of the political process, responsible intelligence officials are obliged to abide by an authoritative decision limiting their scope of operation.

Part 4 MANAGEMENT OF THE INTELLIGENCE COMMUNITY

Issue #13: The authority of the Director of Central Intelligence as intelligence adviser to the President should be strengthened by requiring submission of an annual report on the combined intelligence budget to the President of the United States.

Every effort should be made to strengthen the position of the Director of Central Intelligence, the Intelligence Community staff, and the committees which otherwise support the Director. Firm leadership is necessary to control the vast and entrenched intelligence bureaucracies. A strong and creative Director might give serious consideration to the lowering of barriers to entry into the intelligence marketplace.

Issue # 14: Efforts to expand consumer-producer "intelligence markets" and to eliminate oligopolist practices of USIB-member agencies would not require legislative reform.

Mr. Harris argues effectively for reform in this area. He may understate the degree of competition among U.S.I.B. agencies and the current channels through which university research expertise is utilized. In this field it is difficult for an outsider to arrive at more than tentative conclusions. Nevertheless, the desirability of reducing the obstacles to more widespread participation in foreign assessments and forecasting appears clear.

While no explicit legislative authority is required to initiate such reforms, the objectives might be accomplished more rapidly if the Director of Central Intelligence received a clear legislative mandate to declassify foreign intelligence (see Issue #20).

Part 5 PROTECTION OF FOREIGN INTELLIGENCE SOURCES AND METHODS FROM UNAUTHORIZED DISCLOSURE

Issue #15: The Commission should recommend U.S. participation in multilateral agreements or treaties to protect peaceful remote sensing systems, and to dedicate designated systems as international observation systems under Article 99 of the United Nations Charter.

This is an especially fruitful area for bilateral negotiations with the Soviet Union and multilaterial arrangements under the United Nations. As noted in the discussion of international law, the major powers and the entire international community have shared interests in remote peacetime observation. Formal recognition of these interests in international agreements and through pooling of information would provide a more effective framework for world security. Shared data might also enhance the development of multilateral analytical capabilities in non-military fields relating to food and energy resources.

Issue #16: The Commission should not support enactment of legislation to protect foreign intelligence sources and methods from unauthorized disclosure.

After reviewing the legislation proposed by the C.I.A., the Justice Department, and Mr. Harris, this writer has reached the conclusion the any new statute would create more difficulties than it would resolve. The wiser course is to allow the federal courts to proceed with the development of limited injunctive remedies along the lines of the Marchetti case.

The theory behind prior restraint upon publication in the Marchetti case goes directly to the heart of the problem--the breach of fiduciary responsibility on the part of persons who have entered into specified contract agreements with the federal government. Furthermore, the courts have taken great care in the course of the Marchetti litigation to limit injunctive relief to matters determined upon judicial review to be properly classified.

It is recognized that, as stated by the Supreme Court in the Pentagon Papers Case, "Any system of prior restraints of expression [bears] a heavy presumption against its constitutionality."[1] Moreover, the Supreme Court may look with greater favor upon prior restraint authorized by Congressional legislation, rather than based on "the inherent powers of the Executive and the courts."[2] If the Supreme Court were ultimately to reject the theory of the Marchetti case on these grounds, Congress could consider enacting legislation to authorize injunctive remedies against persons who breach explicit contractual agreements with the federal government. Such prior restraint is distinguishable from the Pentagon Papers injunction because it is not directed at the press, but rather at the source of the "leak."[3]

For Congress to enact new legislation now would be to invite new problems at the risk of losing the gains made in the Marchetti case. The addition of criminal penalties merely complicates the issue by introducing the uncertainties of prosecutorial discretion and jury trial. The deterrent effect of subsequent punishment is limited at best. Another difficulty is the extension of coverage under a new statute to persons who have not explicitly entered into contracts with the government barring their disclosure of classified information about foreign intelligence sources and methods.

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1 New York Times Co. v. United States, 403 U.S. 713 (1971).

2 See the opinion of Justice Byron White, op. cit.

3 ". . .it is clear to me that it is the constitutional duty of the Executive--as a matter of sovereign prerogative and not as a matter of law as the courts know law--through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." Opinion of Justice Potter Stewart, op. cit.

Part 6 OVERSIGHT OF FOREIGN INTELLIGENCE ACTIVITIES

Issue #17: Any legislation to protect intelligence sources and methods should expressly exempt communication of foreign intelligence, and intelligence sources and methods to any duly authorized Committee of the Congress upon "lawful demand" or otherwise.

Mr. Harris properly suggests that a duly constituted Congressional Committee may not know enough to issue a "lawful demand" for information. Thus, any narrower exception would impede Congressional access to information it has a constitutional right to possess and receive (although an individual Congressman may not have the right to demand such data).

Issue #18: Any revised format of Congressional oversight of intelligence activities should adapt procedural safeguards from NSA and AEC oversight practice.

This Commission should recommend that the House of Representatives waive Rule XII, which gives any member of the House access to all committee documents. Especially sensitive documents should not be made available to non-members of the intelligence oversight committees. This would make it possible for the Director of Central Intelligence to submit his annual report on the combined intelligence budget to the intelligence oversight committees, as well as to the President. (See Issue #13.)

Issue #19: Presidential advice respecting foreign intelligence (PFIAB or PSAC-equivalent) should not be formalized by statute, but should be left to Presidential discretion by executive order.

This Commission should recommend that President Ford re-establish the PFIAB by Executive Order and look to it for advice and guidance. However, statutory authorization might derogate the authority of the Director of Central Intelligence.

Issue #20: The Commission should seek to enhance public access to intelligence information, and accelerated de-classification of public records by reform of the responsibility of the Director of Central Intelligence to protect "sensitive intelligence sources and methods" but also to mandate "declassification of such foreign intelligence information as is consistent with these duties."

While declassification may be of value to historians, its greatest benefits would arise in conjunction with reforms to widen access to the intelligence marketplace. (See Issue #14.) Such steps may be taken without Congressional action; but if changes are to be made in the Director's responsibilities to protect "sources and methods," then a mandate to declassify would be in order.[1]

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[1] "If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained." Opinion of Justice Potter Stewart, New York Times Co. v. United States, 403 U.S. 713 (1971).

LEGAL AUTHORITY FOR THE CONDUCT AND CONTROL OF FOREIGN INTELLIGENCE ACTIVITIES

A Summary of Issues Prepared for the Commission on the Organization of the Government for the Conduct of Foreign Policy

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October 30, 1974,
revised
November 22, 1974.

*Views expressed are solely those of the author, and should not be construed as representing views of the Commission or its staff.

SUMMARY

Review of legal authority indicates that essential U.S. foreign intelligence functions may be performed consistently with the laws and constitution of the United States, with two possible exceptions: the National Security Agency may require legislation if assigned enlarged collection duties (Issue 7, pp.15-16), and criminal sanctions may be required to protect against unauthorized disclosure of intelligence sources and methods (Issues 16, 17, 20, pp. 33-38, 40-41, and Appendix 1).

Earlier delegations of intelligence functions beyond lawful authority (pp. 2-4), without adequate legal advice, needlessly damaged the foreign intelligence mission. Present delegations of authority by National Security Council Intelligence Directive (NSCIDs) are consistent with law. A new NSCID addressing standards and procedures to safeguard domestic collection of foreign intelligence would be appropriate (p. 7), within a broader effort to regulate not only the aperature of domestic collection but also the adequacy of surveillance records, sanctions for improper disclosure, and safeguards for external access (pp. 8-11). Emphasis upon dissemination of foreign intelligence of commercial value (p.13), intelligence support of the United Nations and specialized agencies (pp.13-14), or specific new fields of intelligence (p.17) would be accelerated by specific legislative assignment of functions.

Clandestine services have been undertaken consistently with the National Security Act of 1947 (though ambiguous on its face), as elucidated by annual budget and oversight review by four Committees of the Congress (pp.5-7). However, certain clandestine services may be inconsistent with particular treaty obligations which, under the supremacy clause of the constitution, are part of the laws of the United States (pp. 7, 19). It is proposed that inconsistent practices of the United States in international legal practice and in direction of clandestine service functions by the National Security Council be rendered more fully compatible by amendment of the National Security Act of 1947, so as to require a legal opinion prior to such National Security Council authorizations (pp. 19-21, and Appendix 2).

Were a prima facie case established that the clandestine services of CIA should be "spun off", it is suggested that any "spin off" not be imposed upon the National Security Council, but be rendered discretionary so as not to compel an arrangement which with hindsight may appear to be unworkable (Issue 11, pp. 21-22, and Appendix 2). If the case for a "spin off" has not been adequately demonstrated (and in this author's view it has not been so demonstrated), even the discretionary "spin off" authority may be unwarranted. Requiring Presidential certification of clandestine services appears unsound (Issue 12, pp.22-23).

SUMMARY (CONTINUED)

Efforts to strengthen the managerial authority of the Director of Central Intelligence are addressed (pp.25-27). The impact of legislative direction of an annual budget report (now issued) by the Director of Central Intelligence is considered (Issue 13, pp. 27-28) as is the possibility of providing statutory authority for the Intelligence Community (IC) staff (p.28). Obstacles to introduction of market or quasi-market mechanisms (by which consumer needs might be more adequately met) are not primarily legal in nature. Discriminatory informational practices by intelligence producing agencies, which have the effect of precluding governmental access to outstanding analytic skills in universities, industry, and other research institutes deserve careful review, and perhaps investigation by the General Accounting Office (Issue 14, pp.30-31).

Two aspects of the protection of foreign intelligence sources and methods are reviewed: strengthening international law safeguards for remote sensing in peacetime (Issue 15, p.32), and strengthening U.S. criminal laws so as to reverse an ethic of fiduciary irresponsibility respecting protection of intelligence sources and methods (Issue 16, pp.33-38). Department of Justice draft legislation (Appendix 1, Tab D) appears to be constitutional but inadequate. CIA draft legislation (Appendix 1, Tabs C and F) appears to be unconstitutional, and, even if constitutional, inadequate to protect against extraterritorial disclosures. Amendments to draft legislation are suggested (p.37). It is proposed that the Commission consider the issue of supporting the principle of strengthened criminal sanctions rather than supporting any particular draft of proposed legislation. Protection of Congressional access to executive information does not appear to be adequate in either the Department of Justice or the CIA draft legislation (Issue 17, p. 38, and Appendix 1, pp. A8-A10).

Oversight of foreign intelligence by Congress is to be considered by another Commission panel. Procedural safeguards for sensitive intelligence information are here considered (Issue 18, pp.38-39), so that Congressional oversight may be rigorous, and so that the appearance of diligence need not be shielded from view. Review by Presidential advisory groups, with or without a statutory basis (Issue 19, pp.39-40), and by accelerated public access to intelligence information (Issue 20, pp.40-41) are discussed. Although reform of the U.S. foreign intelligence community is not primarily an issue of law, it is essential that duties be assigned and faithfully executed in accordance with the constitution and laws of the United States.

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LEGAL AUTHORITY FOR THE CONDUCT AND CONTROL OF FOREIGN INTELLIGENCE ACTIVITIES - A SUMMARY OF ISSUES

by William R. Harris*

§ 1 FOREIGN INTELLIGENCE AND GOVERNMENT UNDER LAW

The secrecy and mystique of foreign intelligence activities exascerbate the usual difficulties of public agency accountability. As has often been noted, there is no substitute for leadership of integrity and self-discipline.[1] Still, the discipline of legal accountability remains a bulwark of liberty, in a society where, strictly construed, executive power is the power to execute the laws.[2] Because it is undisputed that intelligence agencies are fully bound by the laws and constitution of the United States, any proposed statutory prohibition against official agency participation "in any illegal activity within the United States"[3] raises the fundamental question of legislative propriety.

The first issue, then, respecting legal authority for the conduct and control of foreign intelligence activities, is as follows:

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* J.D., Harvard Law School, 1966; member of the New York Bar, and Social Science Department, The Rand Corporation. Views expressed are solely those of the author.

1 See, e.g., Tom Wicker, John W. Finney, Max Frankel, E. W. Kenworthy, et al., "The C.I.A.: Qualities of Director Viewed as Chief Rein on Agency," The New York Times (April 29, 1966), at 1, 18.

2 Kendall v. U.S., 12 Pet. (U.S.) 524, 9 L. Ed. 1181.

3 S.3767 (Proxmire), proposed subsection, Title 50 U.S.C. § 403(g)(2) (July 16, 1974).

Issue #1: Should the Commission[4] in its Report to the President and the Congress reaffirm the fundamental importance of compliance with the laws of the United States in the conduct of intelligence in support of foreign policy?

It is a duty of the Commission, under Section 603(a) of its enabling legislation, to "study and investigate the . . . methods of operation, and powers of all departments, agencies, independent establishments, and instrumentalities of the United States Government participating in the formulation and implementation of United States foreign policy. . . ."

If with only rare but significant exceptions, the relevant intelligence organizations have provided foreign intelligence support consistent with the laws and Constitution, and if these rare but significant exceptions could generally have been avoided by attention to legal process, the Commission could perform a valuable service by noting the importance of compliance with the safeguards of law, even or especially in matters of sensitive foreign intelligence.

Safeguards to avoid abuse of domestic intelligence collection for "foreign intelligence" purposes are reviewed in § 2 of this document. Of prior interest are the lessons of the Senate Select Committee and House impeachment investigation as they pertain to the essentiality of legal advice and the necessary integrity of that advice in matters of national security intelligence.

Today, because of failures to consult official counsel or because of the timidity of such counsel, the United States

[4] The "Commission" as hereafter named refers to the Commission on the Organization of the Government for the Conduct of Foreign Policy, established pursuant to the Foreign Relations Authorization Act of 1972, Public Law 92-352, 86 Stat. 489, H.R. 14734.

is deprived of certain foreign intelligence of increasing relevance to the conduct of foreign policy. The General Counsel of one U.S. foreign intelligence organization often considered the most capable of the U.S. intelligence agencies, believes that had he been so consulted the Director of his organization might not have condoned nor approved the Special Report [of the] Interagency Committee on Intelligence (Ad Hoc),[5] which on June 25, 1970 was transmitted to the President with proposals for admittedly illegal reading of first class mail and surreptitious entry operations, and warrantless wiretapping of ambiguous legality.[6]

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[5] See 7 House Comm. on the Judiciary, Impeachment Proceedings at 384-442 (1974), for a modestly sanitized, declassified version of this top secret plan, whose cover reads: "This report, prepared for the President, is approved by all members of this committee and their signatures are affixed hereto. /s/ J. Edgar Hoover, Director, Federal Bureau of Investigation, Chairman; /s/ Richard Helms, Director, Central Intelligence Agency; /s/ Lt. General D. V. Bennett, USA, Director, Defense Intelligence Agency; /s/ Vice Admiral Noel Gayler, USN, Director, National Security Agency." Further, "the three military counterintelligence services. . . participated in these considerations." [(Report, at 23 (1970)]. FBI Director Hoover included dissents to each of the clearly illegal domestic collection recommendations. This report carries the misnomer "The Huston Plan" in most press commentaries, in recognition of the drafting of at least a version of the report by a White House staff official.

[6] Not until the June 19, 1972 Supreme Court decision in the Keith case, was the executive branch clearly on notice that government surveillance aimed at wholly domestic threats was not exempted from the warrant requirement. U.S. v. U.S. District Court for the Eastern District of Michigan, Southern Division, 407 U.S. 297 (1972). Domestic activities jeopardizing the foreign relations of the United States and possible safety of U.S. officials overseas may yet be lawfully subject to warrantless surveillance. See Zweibon v. Mitchell, 363 F. Supp. 936 (D.D.C. 1973).

> ". . .there are numerous indications, in evidence received. . . that the types of activities recommended in the plan were carried out in the following years. The net effect was to subvert or distort the legitimate intelligence functions of the government."[7]

It is ironic that the lawful collection of foreign intelligence derived from international communications was impeded by the disregard of law in other respects.[8] For the Commission to reaffirm the importance of compliance with lawful restraints would contribute to the protection of those intelligence functions which significantly support the conduct of foreign policy, and would contribute to public confidance in these important institutions. Particularly is this so because the legislative framework of the National Security Act of 1947 remains essentially sound as a delegation of foreign intelligence functions. The supervision by the National Security Council, the coordination by the Director of Central Intelligence, and the pluralism of multi-agency evaluation and dissemination are prudent characteristics of this Act.[9] The delegations of legislated authority under the National Security Act of 1947 are consistent with that Act, and cannot reasonably be construed otherwise.

In accordance with the intelligence research study plan transmitted by the Commission chairman to the Director of Central Intelligence, this author has reviewed (in the offices of the National Security Council) each of eight enumerated and highly classified National Security Council Intelligence Directives (NSCID's) for the purpose of ascertaining the consistency

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7 Senator Lowell Weicker, Final Watergate Report, 8 on "The Intelligence Community," at 63 (1974). Senator Weicker cites a sample of that portion of the evidence then available, at his notes 183-186, and p. 62 et seq. of his report.

8 See infra, Issue #7, Statutory Authority for NSCID's.

9 See Supplement to Appendix 2 for text of the 1947 Act.

of such delegations with the laws and Constitution of the United States.[10] In all respects, specific delegations of functions under these directives appear to be in compliance with the laws and Constitution of the United States.

Further, delegations by the National Security Council of other clandestine service functions [11] - though not contained in these NSCID's - appear to be consistent with the intent of the legislative draftsmen of the "other functions and duties" subsection of the National Security Act of 1947, though ambiguous on its face, and more importantly, because of the textual ambiguity, ratified annually by both Houses of Congress through post-briefing budget authorizations.

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10 In Victor Marchetti and John D. Marks, The CIA and the Cult of Intelligence, at 322-323 (1974), it is claimed that "[i]n fact (sic), the National Security Act of 1947 and the supporting Central Intelligence Act of 1949 are little more than legal covers which provide for the existence of the CIA and authorize it to operate outside the rules affecting other government agencies. The CIA's actual role is spelled out in . . . that series of classified executive orders called National Security Intelligence Directives. . . . the public still has no way of knowing what that mandate is." In August 1974 Senator Proxmire testified before the Subcommittee on Intelligence of the House Armed Services Committee respecting ". . . the so-called secret charter of the CIA . . . The . . . NSCIDs," urging that "[t]he NSCIDs should . . . be the subject of an intensive investigation by the [oversight] committees." Statement of Senator Proxmire, at 2 (1974).

11 Previously reviewed by the author. No opinion is expressed with respect to National Security Council delegations (other than NSCID's) in the period 1965-1974, in directives not reviewed by the author. Because the National Security Council is, by statute, advisory to the President, National Security Council decisions and directives remaining in force should not generally be construed as inconsistent with Presidential policy. Thus, the statement prepared for and publicly released in the name of President Harry S. Truman, in December 1963, stating, inter alia, "I never had any thought that when I set up the CIA it would be injected into peacetime cloak-and-dagger operations. Such activities violate the very [illegible] than the relevant National Security Council directives of the Truman Administration.

Defeat of a blanket prohibition of CIA covert action by a lopsided margin in October 1974,[12] is far less significant than the knowledge of customary practice, and annual budget review by four oversight committees of the Congress.[13] Uncertainty respecting the scope of National Security Council delegations of functions, on the part of then-Director of Central Intelligence Hillenkoetter in 1947-1948, was resolved by NSC directives within the first year of operation under the National Security Act of 1947.

Accordingly, the clandestine service functions which are performed may fairly be characterized as consistent with the legislative purpose of the National Security Act of 1947,

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12 The Abourezk Amendment to the Foreign Assistance Act of 1974, would have added to the Foreign Assistance Act of 1961 § 661, "Illegal Activities in Foreign Countries," to prohibit "any agency. . . to carry out any activity within any foreign country which violates, or is intended to encourage the violation of, the laws of the United States or of such country." Under the supremacy clause of the U.S. Constitution treaties become the supreme law of the land, but the municipal laws of foreign states are not generally recognized as obligations of the United States. The Abourezk Amendment was defeated by a vote of 68-17. See Cong. Rec., daily ed., at S18041-S18056 (Oct.2, 1974). A vote against a blanket prohibition is not necessarily a ratification of particular practices, but The Washington Post opined: "The CIA and its supporters can now claim - fairly, we believe - that for the first time the agency has a congressional mandate, if only from one house, for covert operations. No longer can CIA operations be regarded as an unauthorized presidential habit or cold-war carryover. . ." Editorial, "The Senate and the CIA," Washington Post (Oct. 7, 1974).

13 In response to Senator Proxmire's inquiry to the Comptroller General about the legality of conducting clandestine services on the basis of Title 50 U.S.C.A. § 403(d)(5) and secret NSC directives, the Comptroller General replied (1974), "In as much as the Congress as a whole was not given a detailed explanation of the provisions of the CIA Act of 1949 or of the underlying information. . . it seemed that the Congress expected its oversight over the CIA to be handled by the appropriate committees in secrecy. . . ." ___ Compt. Gen ___ (1974).

and consistent with delegations of functions and duties by the National Security Council. Inadequacies of attention to the obligations of the United States under international law are addressed in discussions of Issues #11 and #12, infra, and Appendix 2. Excepting certain international legal obligations, the gravamen of objections to covert action is a matter of public policy, not law.

Review of the eight enumerated National Security Council intelligence directives prompts this author's suggestion that minor modifications be issued respecting two of these directives, and that an additional ninth NSCID be issued, delimiting the scope and procedures respecting domestic collection of foreign intelligence, and directing in this connection the Director of Central Intelligence to make recommendations "for the coordination of such [foreign] intelligence activities," consistent with subsection 403(d)(2) of the National Security Act of 1947.[14]

Proposed reforms notwithstanding, essential foreign intelligence activities (with two possible exceptions[15]) may be performed consistently with the laws and Constitution of the United States, and are generally so performed.

The Commission's commendation of legal review of prospective intelligence programs, and legal reform as appropriate, would contribute to the strengthening of public support of foreign intelligence institutions.[16]

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[14] See Appendix 2, Supplement, for statutory text. See also Issues #2 and #3.

[15] See Issue #7, respecting the National Security Agency, and Issues #16-17 on protection of intelligence sources and methods from unauthorized disclosure.

[16] Standards of conduct and review are of special concern to the legal profession. It is not surprising that of the first 15 sponsors of the Baker-Weicker proposal for a Joint Intelligence Committee, S. ___ (1974), 12 had legal training, and a thirteenth had been a professor of political science. Of the 17 yea voters for the Abourezk Amendment (see Note 12), 10 had legal training and three had been professors of political science or history.

§ 2 AUTHORITY WITH RESPECT TO FOREIGN INTELLIGENCE

Issue #2: Should the Commission be concerned with standards and procedures for the lawful collection and safeguarding of foreign intelligence acquired within the United States, or concerning U.S. citizens or corporations abroad?

Whether the Commission should address specific alternative reforms is addressed in Issue #3. Even if the Commission concludes that specific reforms should be elsewhere addressed, if at all, the Commission may wish to draw attention to the question of legislative and/or executive standards for collection and safeguarding of intelligence. Without careful legislative and executive attention, the propriety of warrantless foreign intelligence collection within the United States, admissibility of such intelligence in courts, and sanctions for abusive practices are likely to plague the courts.[17]

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17 See U.S. v. Butenko, 318 F. Supp. 66 (D.C.N.J. 1970), aff'd in part, rev'd in part, 384 F. 2d 554 (C.A.3, 1967), sub nom. Alderman v. U.S., 394 U.S. 165 (1965), on remand, 342 F. Supp. 928 (D.C.N.J. 1972), aff'd, 494 F. 2d 593 (C.A.3, 1974) (en banc), cert. denied sub nom. Ivanov v. U.S., No 73-1648, ___U.S.___, 43 U.S.L.W. 3213 (Oct. 15, 1974)(Justices Douglas, Brennan, and Stewart, dissenting; not participating, Justice Marshall) (foreign intelligence surveillance presumptively reasonable under Fourth Amendment); Zweibon v. Mitchell, 363 F. Supp. 936 (D.D.C. 1973); U.S. v. Brown, 317 F. Supp. 531 (1970), rev'd on other grounds, 456 F. 2d 1112 (C.A.5, 1972); U.S. v. Clay, 430 F. 2d 165,(C.A.5, 1970), rev'd on other grounds, 400 U.S. 990 (1971); U.S. v. Dellinger, Crim. No. 60 CR 180 (Mem. Op. N.D. Ill., Feb. 2, 1970), rev'd on other grounds, 472 F. 2d 340 (C.A.7, 1972); U.S. v. Brown, 484 F. 2d 418 (C.A.5, 1973); U.S. v. Blanchard, 495 F. 2d 1329 (C.A.2, 1974). But see: U.S. v. Smith, 321 F. Supp. 424 (D.C.Cal. 1971); U.S. v. Sinclair, 321 F. Supp. 1074 (E.D.Mich, 1971), aff'd sub nom. U.S. v. U.S. District Court, 407 U.S. 297 (1972); Coplon v. U.S., 89 U.S. App. D. C. 103, 191 F. 2d 749 (1951); U.S. v. Erlichman, Cr. No: 74-116, ___F. Supp.___ (D.D.C. May 24, 1974); Toscanino v. U.S., ___F. 2d___ (C. A. 2, 1974), rehearing denied, ___F. 2d___ (C.A.2, Oct. 8, 1974) Kinoy v. Mitchell (pending); Halperin v. Kissinger, Civ. No. 1178-73 (D.D.C. pending); U.S. v. Ayers, Cr. No. 48104 (D.C.E.D. Mich.,

If the adage that "hard cases make bad law" applies, the results of inattention could neither encourage adequate foreign intelligence collection nor safeguard the liberties of private citizens.

An era of shifting power respecting scarce natural resources, threats of international cartel boycotts, competition for agricultural exports and multinational corporation spillovers (the larger of which have annual value-added in excess of the gross national products of some 80 U.N. member-states[18]) is an era requiring transnational intelligence,[18a] not strictly domestic and not strictly foreign.

The conduct of foreign policy will be impeded if transnational U.S. intelligence is not obtained legitimately, and under appropriate safeguards.

Issue #3: Should domestic collection of foreign intelligence or transnational intelligence be safeguarded by (a) legislatively mandated search warrants of courts of competent jurisdiction; (b) executive promulgation of standards for foreign intelligence collection; (c) legislatively mandated protection from public disclosure, and/or criminal sanctions for abuse or domestic, transnational, or foreign intelligence; or (d) legislatively mandated standards for domestic collection of foreign intelligence?

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17 (cont.)
dis'd, Oct. 15, 1973). See generally, Note, "Foreign Security Surveillance and the Fourth Amendment," 87 Harv. L.Rev. 976 (1974); John T. Elliff, "The FBI and Domestic Intelligence," in R. H. Blum (ed.), Surveillance and Espionage in a Free Society, at 20-45 (1972).

18 Joseph S. Nye, Jr., "Multinational Corporations in World Politics," 53 Foreign Affairs 153 (Oct. 1974).

18a Transnational intelligence is herein defined as intelligence from international communications which are transmitted from the United States. A portion constitutes foreign intelligence, even if collected within the U.S.; a portion constitutes

It is proposed that the Commission should recognize the importance of reform, without seeking to find a static solution to a dynamic and complex sector of public policy. The legislature cannot mandate that the executive be blind, or half-blind. Presidential powers in foreign affairs and as commander-in-chief imply a right to seek necessary information, though not an extra-constitutional right to bypass the "search and seizure" safeguards of the Fourth Amendment.[19] But as elucidated by Mr. Justice Jackson, the Bill of Rights ought not be read as a suicide pact.[20]

Prior to Watergate and the Keith case, this author proposed in March 1972 that all electronic surveillance in the U.S. be undertaken only by court order.[21] Subsequent events and recent interviews have led to a change of view: that the aperature of foreign intelligence collection, even within the United States, should be of executively-determined dimensions, but under precise standards and duties of coordination,[22] and subject to legislatively-mandated safeguards of permanent record-keeping, sanctions for improper disclosure, and judicially-

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19 See § on "Erlichman's Law," in W. Hare, "Inherent Presidential Power: Protection or Usurpation?" 3 U. San Fernando Valley L. Rev. 59, at 76-81 (1974); Raoul Berger, Executive Privilege: A Constitutional Myth, c.3, "Presidential Powers: The 'Executive Power'";c. 4, 49-116 (1974). The extraconstitutional claims of sovereign power, enunciated by Justice Sutherland in the Curtiss-Wright case [299 U.S. 304 (1936)] fail to recognize that the powers of King George III were distributed, even as to foreign affairs, in part to the Congress. See the important opinion of Judge Gibson, dissenting in part, in U.S. v. Butenko, 494 F. 2d 593, at 626-635 (C.A.3, 1974). Also see C. Lofgren, "United States v. Curtiss-Wright Export Corporation: An Historical Reassessment," 83 Yale L. J. 1 (1973).

20 Terminiello v. Chicago, 337 U.S. 1, at 37 (1949)(Jackson, J., dissenting).

21 W.R. Harris, "Internal Security Practices of the U.S. Government: The Need for Presidential Appraisal," in R. Blum (ed.), Surveillance and Espionage in a Free Society, at 61-83 (1972).

22 In particular, see [illegible]. See also the standards of Title 18 U.S.C.s 2511(3), drafted by the General Counsels of CIA and NSA.

determined access.[23]

These topics involve a detailed examination such as the Commission may choose to avert. What is important is not that the Commission resolve these matters; but that these matters be appropriately resolved, so as not to discredit the transnational intelligence functions increasingly relevant to the conduct of foreign policy. In this connection, not only the United States Intelligence Board members but also other agencies like the U.S. Postal Service should be mindful of the importance of lawful restraints on intelligence,[24] so as to preserve that domain which is legitimately within the intelligence purview.

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[23] My colleague, Professor John T. Elliff of Brandeis University, is presently undertaking a relevant study of domestic intelligence, under grant from the Police Foundation. The National Commission for Review of Federal and State Laws Relating to Wiretapping is conducting hearings and commissioning relevant research.

[24] Governmental interest in monopoly of the mails has often been related to intelligence priorities. See Eugène Vaille, Le cabinet noir (1950); Kenneth Ellis, The [British] Post Office in the Eighteenth Century (1958). Early efforts to assure privacy of the U.S. mails are summarized in A. F. Westin, Privacy and Freedom, at 335-336 (1970).

In Ex parte Jackson, 96 U.S. (6 Otto) 727 at 733 (1878), Mr. Justice Field wrote: ". . .letters and sealed packages . . . are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties. . .The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized. . . . No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

Although a "plain view" of illegal matter will permit warrantless seizure, the postal service may not break the package first to obtain the "plain view." People v.

24 (cont.)
Moraitis, 312 N.Y.S. 2d 175, 63 Misc. 2d 344 (1970). See Title 39 U.S.C.A. § 3623(d), (1973 ed.); 26 U.S.C. § 6334 (a)(5)(1970 ed.)

Foreign mail is subject to customs inspection. See J. H. Hillenbrand, "Customs authority to search foreign mail," 6 N.Y.U.J. Int'l L. & Politics 91-114 (1973).

The Special Report [of the] Interagency Committee on Intelligence (Ad Hoc) reported to the President on June 25, 1970: ". . .Essentially, there are two types of mail coverage: routine coverage is legal, while the second -- covert coverage -- is not. . . . Covert mail coverage, also known as 'sophisticated mail coverage,' or 'flaps and seals,' entails surreptitious screening and may include opening and examination of domestic or foreign mail. This technique is based on high-level cooperation of top echelon postal officials."

". . . Covert Coverage: [1] High-level postal authorities have, in the past, provided complete cooperation and have maintained full security of this program. [2] This technique involves negligible risk of compromise. Only high level postal authorities know of its existence, and personnel involved are highly trained, trustworthy, and under complete control of the intelligence agency. [3] This coverage has been extremely successful in producing hard-core and authentic intelligence which is not obtainable from any other source." Report, at 29, 30 (1970).

In a White House memorandum of July 15, 1970 T. C. Huston informed the ad hoc intelligence committee (FBI, CIA, NSA, DIA) that "The President has carefully studied the special report... and made the following decisions: .....[3] Mail Coverage ..... restrictions on covert mail coverage are to be relaxed to permit use of this technique on selected targets of priority foreign intelligence and internal security interest."

Subsequent to FBI Director Hoover's inability to obtain signed Presidential confirmation of his decisions, various aspects of this 1970 report plan are believed to have been terminated, between July 28, 1970 and 1973, the year in which this report was publicly released. As of October 1974 U.S. Postal Service responsibility for investigation of mail interception crimes [Title 18 U.S.C. §1701 et seq.; Title 18 U.S.C. §241 (civil rights)] is vested in the same Criminal Section, Postal Inspection Service which is responsible for approving "routine mail cover" requests of U.S. intelligence agencies and other departments.

Issue #4: Should the Commission recommend new legislative authority for CIA or other USIB agencies to collect, disseminate and protect foreign intelligence of commercial value?

The National Security Act of 1947, as amended,[25] does not provide any special mandate to collect foreign intelligence of commercial value. It was suggested, in the course of interviews, that (a) CIA made inadequate use of technological, and economic intelligence of commercial benefit to U.S. firms; and (b) that inclusion of a commercial intelligence mission was not part of the CIA mandate. Information is from time to time disseminated through the Departments of Agriculture, Commerce, Defense, and Treasury, and the Council of Economic Advisers. Any commercial intelligence support of these other agencies should assure nondiscrimination in public access and provide sanctions for misuse of commercial intelligence.[26]

Issue #5: Should the Commission recommend establishment by the executive branch or new legislative authorization of a mission within the U.S. foreign intelligence community to provide (with or without cost reimbursement) international intelligence support to the Secretariat of the United Nations or U.N. specialized agencies, subject however to required protection of vulnerable "sources and methods" from disclosure?

Systematic U.S. intelligence support of the United Nations could serve the following purposes: first, to assist the U.N. Secretary-General in performing his duties;[27] second, to impart relevance and timeliness to U.N. debate; third, to strengthen, on a multilateral basis, disincentives for covert operations, rather than concentrate attention solely on issues

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25 See supplement to Appendix 2.

26 As for example, with agricultural commodity information. Classified access should not be restricted to government contractors.

27 Article 99 of the U.N. Charter provides that "[t]he Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."

of unilateral U.S. abstention; fourth, to legitimate under international law and practice remote sensing systems, the defense of which by physical means or other countermeasures would tend unnecessarily to waste considerable resources of the U.S., the U.S.S.R. and other remote sensing sponsors.

At the present time there is no U.S. government organization tasked with the screening of U.S. foreign intelligence, and its systematic provision (subject to security review) to the U.N. or specialized agencies. The Bureau of Intelligence and Research in the Department of State could constitute such an office. Among criticisms of this approach are the following: first, on an ad hoc basis, through the Office of the Assistant Secretary of State (International Organizations), or through the Secretary himself, considerable information is provided the U.N. and specialized agencies; second, it is feared that formalized liaison would be captured by "security drones" who would impede transmission of information;[28] third, the U.N. would have to establish a real-time information base, and skilled personnel, to utilize such support; fourth, prospects for U.N. payment of marginal costs are not propitious; and fifth, it is tactically advantageous to transmit only that portion of U.S. intelligence which supports U.S. advocacy.[29]

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[28] But without systematic review, vulnerable intelligence sources and methods may be compromised, or major system output (now overclassified) not proferred.

[29] See Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, "The Intelligence Function and World Public Order," 46 Temple L. Q. 365, at 381-383 (1973); I. J. Rikhye, M. Harbottle, and B. Egge, The Thin Blue Line: International Peacekeeping and Its Future (forthcoming, Yale University Press, Dec. 1974); and Alva Myrdal, "The International Control of Disarmament," 231 Scientific American, 21-33 (Oct. 1974). Article 99 of the U.N. Charter was utilized by the Secretary-General in the Congo (1960). With respect to trusteeship duties and human rights, the U.N. has broad investigative powers. Investigative groups are not necessarily accorded the assistance of affected states. E.g. 1 U.N. SCOR 1st Ser. No. 28 at 760-1 (1946).

Issue #6: Should the Commission recommend legislative authorization and confirmation by advice and consent of the Senate of the Defense Intelligence Agency and its Director?

Directorships of the major foreign intelligence agencies are of sufficient significance as to warrant Senatorial confirmation hearings. Signatures of the major foreign intelligence agency directors on the June 25, 1970 special intelligence report are a reminder of the need for close Congressional supervision of the appointment process.

Further, continuing dissatisfaction with the capabilities of the Defense Intelligence Agency may at least be channeled by more direct Congressional accountability.

Issue #7: Should the Commission recommend supplemental legislative authorization and confirmation by advice and consent of the Senate of the National Security Agency and its Director?

The National Security Agency has, at least by implication, sufficient authority of law to undertake those missions which are its present responsibility.[30] NSA constitutes an important foreign intelligence resource; quite understandably its institutional support should not be undermined by tasking the agency with transnational economic intelligence or other transnational collection tasks which are not clearly of lawful origin.

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30 NSA was established by executive order in 1952, and was thereby impliedly recognized by consequence of the Act of October 31, 1951, found at Title 18 U.S.C. § 798(b), as a protected cryptologic authority designated by the President. P.L. 86-36 of 1959 provided administrative authority for NSA. Since 1962 there have been direct annual Congressional appropriations. Following the Martin-Mitchell defections, personnel security provisions were established under P.L. 82-90 of 1964. A Congressional subcommittee which reviewed the legal authority of various Defense agencies did "not question [NSA's] legal authority," as a Presidentially-established agency. See U.S. Congress, House Armed Services Committee, Report of Special Subcommittee on Defense Agencies, 87th Cong., 2d Sess., at 6822 (1962).

[This page has been deleted in its entirety per determination of classification by the National Security Agency.]

Issue #8: Should the Commission recommend legislative delegation of responsibility for new fields of foreign assessment and forecasting?

Simply put, if the Congress wishes to accelerate forecasting and assessment of unconventional subjects - e.g. terrorism, narcotics, international environmental trends, world resource scarcity, foreign energy technologies[33] - delegation of specific missions to specific agencies should be considered. In opposition, one may postulate the undesirability of fixing by law jurisdictions for unknown forecasting needs. If consumers were better represented in decisions respecting intelligence production, or if market mechanisms were applied to intelligence, demand for new products might appropriately fluctuate and should not be constrained by law.

If the Congress mandates new fields of forecasting and assessment, a rebuttable presumption in favor of unclassified production might avoid undue "capture" by foreign intelligence agencies of work better performed by other government, industrial, non-profit, or university institutes.

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33 See also the Commission working paper of Colonel Frank L. Schaf.

§ 3 CLANDESTINE SERVICES UNDER MUNICIPAL AND INTERNATIONAL LAW

> ". . .I do not intend to disparage Intervention. It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless, it must be admitted that in the case of Intervention, as in that of Revolution, its essence is illegality, and its justification is its success. Of all things, at once the most unjustifiable and the most impolitic is an unsuccessful Intervention."
>
> Historicus[34]

Issue #9: Do clandestine services constitute a per se violation of the obligations of the United States under international law?

The simple answer to this question is, "no, not in gross."[35] Sir William Harcourt, at once captures the frailties of international law and the perils of its violation, but in his objections to British intervention in the American civil war he presumed a concept of intervention too rigid for late twentieth century politics.[36]

Under traditional international law, the individual agents committing espionage or sabotage may be in violation of municipal criminal law, but the crime is not a delict of the sponsoring government.[37] Espionage offenses were treated under the laws of war.

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[34] Sir William G. G. Harcourt, "A Letter on the Perils of Intervention," in Letters by Historicus on Some Questions of International Law (London: Macmillan & Co., 1863), p. 41.

[35] Even Richard A. Falk, in his paper, "CIA Covert Operations and International Law" (Sep. 1974), bases his condemnation on particular categories of international law violations.

[36] See e.g. Andrew Scott, The Revolution in Statecraft: Informal Penetration (1965).

[37] See E. de Vattel, The Law of Nations, § 179 (espionage); H. Lauterpacht, "Revolutionary Activities by Private Persons Against Foreign States," 22 Amer. J. Int'l L. 105 (1928); C. C. Hyde, "Aspects of the Saboteur Cases," 37 Amer. J. Int'l L. 88 (1943); Richard R. Baxter, "The So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs," 28 Br. Year book Int'l L. 323 (1951); Jonathan G. Cohen and R. Kovar, "L'espionnage en temps de paix," Ann. Français de Droit Int'l 1960, at 239-255(1961). But see Manuel R. Garcia-Mora, International Responsibility for Hostile Acts of Private Persons Against Foreign States (1962).

Peacetime reconnaissance was implicitly licit, or otherwise neglected by international law treatises, except as to diplomatic agents who were accorded protected status, subject to persona non grata expulsion. A state could protect by force its territorial integrity.

Intelligence gathering by remote sensing has gradually become an accepted instrument of international discourse. Recent acknowledgment of "national means of verification" in the 1972 SALT agreements is a prelude to formal recognition of the essentiality of remote peacetime observation,[38] without which the likely costs of securing remote satellite systems may be of significant and expanding magnitude.[39]

Article 2 (4) of the United Nations charter, as a treaty to which the U.S. adheres, is under the supremacy clause of the U.S. Constitution the "supreme law of the land,"[40] and requires members to refrain from "the threat or use of force against the territorial integrity or political independence of any state. . . ."

Other treaty obligations are also the supreme law of the United States.[41] Other international documents are only recommendatory. Still others support the right of collective self-defense, consensual government-to-government assistance, or humanitarian intervention.

Most of the clandestine services which the National Security Council "from time to time directs" are likely to be either compatible with international law or at least not unambiguously

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38 "Each party undertakes not to interfere with the national technical means of verification of the other Party. . . ." Interim Agreement. . .With Respect to the Limitation of Strategic Offensive Arms," Art. V(2); ABM Treaty, Art XII(2), May 26, 1972. See also J. T. McNaughton, "Space Technology and Arms Control Observation in Space," in Cohen (ed.), Law and Polities in Space, at 69-94 (1964); MacWhinney, "Changing International Law Method and Objectives in the Era of the Soviet-Western Détente," 59 Amer. J. Int'l L. 1, at 10 (1965); Edmondson, "Espionage in Transnational Law," 5 Vanderbilt J. Trans. L. 43 (1971).

39 Some of these costs must in any event be incurred so as to protect against treaty violation or abrogation. Others costs may be reduced, by the mutual halting of verifiable military development of particular space capabilities.

40 U.S. Approved For Release 2004/03/26 : CIA-RDP80M01133A001000090001-8 Missouri v. Holland, 252 U.S. 416(1920).

41 See Articles 18 and 19 of the Organization of American States

incompatible with U.S. obligations under international law.

In brief, there is need for consideration of U.S. international law obligations, both in the design of any clandestine services and in reviewing the propriety of their approval by the NSC.

Systematic review of these "other functions and duties" could do more than reform the clandestine service practices of the Central Intelligence Agency. Of possibly greater significance, ongoing review of the covert "safety valves" of international conduct might elucidate the irrealism of traditional international law, and infuse that great tradition of "the law of nations" with viable reforms.[42]

An extended wallowing in the rhetoric of the CIA-in-Chile which does not attend to the absence of international legal sanctions is an exercise which would neither explain why the United States was perhaps only the third largest dispenser of largesse (if that) nor prevent a recurrence of compelling interventionist temptation.[43]

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42 See e.g. Philip C. Jessup, "Should International Law Recognize an Intermediate Status Between Peace and War?" 48 Amer. J. Int'l L. 98(1954); John Norton Moore, "The Control of Foreign Intervention in Internal Conflict," 9 Virginia J. Int'l L. 209-342(1969). For historical perspective see Friedrich Meinecke, Machiavellism: The Doctrine of Raison d'Etat and Its Place in Modern History (English ed., 1957); Robert Sobel, The Origins of Interventionism (1961). Neither the Bill of Rights nor international treaty law should be seen as a suicide pact. Former Secretary of State Dean Acheson once said:

> "I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power - power that comes close to the sources of sovereignty." Amer. Soc. Int'l L. Proc. 1963, 13, 14.

43 Lacking evidence and expectations of foreign counter-intervention, Olympia frailties would appear more nearly naked, such as the one-liner: "I don't see why we need to stand by and watch a country go communist due to the irresponsibility of its own people." See Seymour M. Hersh, "Censored Matter in Book About C.I.A. Said to Have Related Chile Activities," The New York Times (Sep. 11, 1974), p. 14.

This line of inquiry leads to an interest in fuller coordination between U.S. efforts to expand the domain of international law, and U.S. efforts to satisfy compelling interests consistent with that domain. Thus, Issue #10:

> Issue #10: Should the Commission recommend amendment of the National Security Act of 1947 to require, prior to authorization of "other functions and duties," an opinion as to the legality under the laws of the United States and obligations of the United States under international law? [See Appendix 2].

This author's original concept had been to require a formal opinion of the Legal Adviser to the Secretary of State. There is, however, by the nature of daily State Department representation in matters of international law an understandable adversity of interest in reviewing clandestine service proposals. Consequently, a suggestion of an experienced official in the Directorate of Operations, CIA, was adopted:

> Were a legal opinion to be required prior to authorization of "other functions and duties" by the National Security Council, that opinion should be furnished by a legal adviser to that body responsible for action - the NSC. [See text of proposal, Appendix 2].

The main argument against this proposal is, quite rightly, that by documenting inconsistencies of proposed covert operations with unambiguous international legal obligations of the United States, contingent costs of publicized failure would thus be enlarged. From another perspective, this is precisely the objective - to render more fully conscious and hold accountable those who pursue illusory or costly goals.[43a] There will still be justifiable occasion to "snatch a remedy beyond the reach of law" but the snatch ought be a conscious larceny.

Turning from the legality of clandestine services to their organization and supervision, one reaches the perennial question of "spinning off" the clandestine services of CIA, either to ameliorate their impact or to quash them - depending upon the

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43a Conversely, licit forms of transnational assistance might, as identified, [illegible] clandestine service activities.

perspective. Personal biases should be clarified for the record: mine are to leave the DDO where it now resides, an unpopular view.

Yet, four circumstances conspire against personal preferences: first, a public mood of understandable unease, after Watergate, a mood supporting change; second, a propensity for observers of the foreign intelligence scene[44] to favor a spin-off; third, the increasing technical-communications potential of third-country and centralized headquarters control; and fourth, the prospect of reform of the National Security Act of 1947 (to protect intelligence sources and methods, inter alia). If my personal biases are misfounded, should clandestine services performed outside CIA but coordinated by the DCI be precluded by Act of Congress? Conversely, if the reformists win, but are wrong, should a return to prior traditions be precluded? It is proposed via Issue #11 that the spin-off be rendered possible but not mandatory:

> Issue #11: Should the Commission recommend amendment of the National Security Act of 1947 to permit, in the discretion of the National Security Council, delegation of "other functions and duties" to the Director of Central Intelligence rather than to the Central Intelligence Agency? (See Appendix 21.

Issue #10, supra, raises the question of imposing the accountability of legal consciousness at the National Security level.

It has been elsewhere proposed by Roger Morris,[45] then by Ambassador Belcher,[46] that Presidential certification of every covert operation be required. This proposal passes from the question of consciousness and NSC accountability to the question of designing such large self-inflicted costs as might

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44 E.g. T.G. Belcher (1974); C.L. Cooper (1974); M. Halperin (1974); H.H. Ransom, The Intelligence Establishment (1970).

45 Roger Morris, "Following the Scenario: Reflections on Five Case Histories in the Mode and Aftermath of CIA Intervention," Paper, Conference on the Central Intelligence Agency and Covert Actions, Sep. 12-13, 1974.

46 Draft Paper, Commission working paper 205223. In a later Draft Paper Ambassador Belcher no longer proposes such certification.

price the U.S. system out of the covert market place, while the barter elsewhere continues. If the object is to forbid particular enterprises, there ought to be more candid vehicles of action. The essence of a covert operation is more likely its disassociation than its invisibility. These proposals would preclude Presidential disassociation. Because such proposals would require legislation, they are included below as Issue #12, in a proposition with which this author disagrees:

> Issue #12: Should the Commission recommend amendment of the National Security Act of 1947 to require Presidential authorization of any "other functions and duties" under subsection 403(d)(5)?

Additional proposals pertaining to clandestine services which, if implemented, would involve amendment of the National Security Act of 1947, are those to place such "other functions and duties" under the Special Assistant to the President for National Security, or under a statutorily-recognized National Security Council Intelligence Committee (NSCIC). Unlike the proposal to permit delegation of clandestine service functions to the Director of Central Intelligence, outside the Agency [as in Appendix 2], the above-mentioned proposals would tend to create uncoordinated operational services, as for example, in liaison with foreign services and in counter-intelligence efforts. Neither CIA nor a separate organization could be expected to refrain from such activities, and in these and other areas the organizations might well operate at cross purposes if responsibility for both were not vested in one place.

Large special operations may be lawfully performed under authority of the Department of Defense, subject however to the War Powers Resolution.[47] Without amendment of the National Security Act of 1947, assignment of clandestine service functions to a civilian agency other than the Central Intelligence Agency would be to create an extraconstitutional entity, operating as did the "plumbers" without authority of law and without Congressional accountability. Conversely, any

47 P.L. 93-148, 87 Stat. 555, Title 50A U.S.C. ss 1541-48 (1974 ed.).

proposed spin-off of the clandestine services should be framed so as to retain or strengthen prohibitions against performance of "police, subpoena, law-enforcement powers, or internal-security functions,"[48] and to retain Congressional accountability, as presently exists via confirmation hearings, oversight hearings, and annual budget review with the Director of Central Intelligence.

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48 Under at least one previous Director of Central Intelligence there were important instances when requests to undertake or participate in police, law enforcement or internal security functions were not firmly rejected. See Marchetti and Marks, The CIA and the Cult of Intelligence, at 224-240, and especially at 224-227 (1974). Many of the activities described by Marchetti and Marks are lawful; their essentiality would be recognized by S. 2597 (Stennis)(Oct. 18, 1973), S. 3767 (Proxmire)(July 16, 1974), and H. R. 15845 (Nedzi, Bray)(July 10, 1974), all providing, inter alia, that nothing in [the] Act shall be construed to prohibit the Central Intelligence Agency from protecting its installations, conducting employee and other clearance investigations, or providing information to other departments and agencies. S. 2597 and H. R. 15845, but not S. 3767, would also protect: "carrying on within the United States activities [necessary to (S.2597)] [in (H.R.15845)] support of its foreign intelligence responsibilities...."

§ 4 MANAGEMENT OF THE INTELLIGENCE COMMUNITY

The same Eberstadt Plan of October 22, 1945 which stimulated unification of the armed services under a National Military Establishment (after 1949, the Department of Defense),[49] also stimulated creation of a Central Intelligence Agency.[50] The inadequacy of managerial authority of the Secretary of Defense, quite early apparent to Secretary Forrestal in 1947-1948, was rectified by statutory reform in 1949 and in the subsequent decade. But the limited statutory authority of the Director of Central Intelligence pertaining to foreign intelligence activities or expenditures of agencies other than the Central Intelligence Agency has remained essentially unchanged since 1947. In accordance with the recommendations of an inter-agency review group, President Kennedy in 1962 transmitted a letter to Director of Central Intelligence McCone:[51]

> "...it is my wish that you serve as the Government's principal foreign intelligence officer, and as such that you undertake, as an integral part of your responsibility, the coordination and effective guidance of the total United States foreign intelligence effort...
>
> ...you will maintain a continuing review of the programs and activities of all U.S. agencies engaged in foreign intelligence activities with a view to assuring efficiency and effectiveness and to avoiding undesirable duplication..."

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49 Ferdinand Eberstadt, et al., Unification of the War and Navy Departments and Postwar Organization for National Security: Report to Hon. James Forrestal, Secretary of the Navy.

50 The Eberstadt Task Force staff report on intelligence was prepared by Captain Sidney W. Souers, subsequently the first Director of Central Intelligence in 1946, later the first Executive Secretary of the National Security Council and Presidential monitor of CIA.

51 Reprinted in Lyman B. Kirkpatrick, Jr., The Real CIA, at 237-9 (1968); Harry Howe Ransom, The Intelligence Establishment, at 267-8 (1970).

This informal authority was viewed as inadequate for effective management of the foreign intelligence enterprise when a joint OMB-NSC review group chaired by James Schlesinger undertook another study in 1970-71. Because President Nixon early instructed the task force to restrict its recommendations to those not requiring new legislation,[52] resulting proposals for more vigorous management by the Director of Central Intelligence were supported only by Presidential directive.[53]

Three years have now passed since the directive of November 5, 1971. Two Directors of Central Intelligence, Messrs. Schlesinger and Colby, have succeeded to the position then held by Mr. Helms. The Intelligence Resources Advisory Committee (IRAC) and the Intelligence Community staff both operate under the aegis of the Director of Central Intelligence but without authority of law.

Despite an apparent trend toward more critical and sweeping review of the combined intelligence budget, within the IC staff and within IRAC, and despite an annual community performance review undertaken by the IC staff, some observers expect that no Director of Central Intelligence lacking clear legislative authority will either support the redirection of intelligence collection against nonmilitary, non-Bloc targets or cancellation of capital-intense projects funded by the Department of Defense. To provide the Director of Central Intelligence authority to impound or otherwise direct intelligence expenditures of agencies other than the Central Intelligence Agency would be to impinge upon Presidential authority, and to encroach

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52 The Schlesinger task force commenced its work in the aftermath of the IAC domestic intelligence report of June 25, 1970. [See this paper, supra at 3-4, and notes 5 and 24]. It is not presently known by the author whether complications respecting implementation of the June 1970 domestic intelligence plan and Presidential decision of July 15, 1970 affected Presidential decision to avoid Congressional involvement in measures to strengthen the authority of the Director of Central Intelligence.

53 See the unclassified text of November 5, 1971, in "Reorganization of the U.S. Intelligence Community," Weekly Compilation of Presidential Documents, [illegible]

upon traditional departmental powers. For the Congress to impose such authority would be to encroach upon the separation of constitutional powers.

What then, if anything, can be done to strengthen the hand of the Director of Central Intelligence, and the Intelligence Community staff and the committees which otherwise support the Director? Perhaps there is no legislative assistance which could be, at the same time, widely acceptable and of significant impact.

One possibility is to provide at least Congressional ratification of the Director's annual report on the combined intelligence budget, thus to strengthen any temptations the Director might have to insist, as necessary, that a better justification or cost projection be furnished, or that a proposed collection system be cancelled. The original suggestion, as posed, was that the Director of Central Intelligence be directed to furnish an annual report to the Congress of the United States. Subsequent to Congressional disclosures respecting prior testimony on CIA programs in Chile, a committee counsel suggested that it would be preferable that an annual report on the combined intelligence budget not constitute a formal Congressional document, so as to safeguard the material from disclosure through other than the approved intelligence oversight committees. Were the Congress to amend its rules so as to safeguard intelligence documents, as with the Joint Committee on Atomic Energy, a report to both the President and the Congress might be advisable. Otherwise, a report to the President could furnish the basis for informal briefings to the congressional oversight committees:

Issue #13: Should the authority of the Director of Central Intelligence as intelligence adviser to the President be strengthened by requiring submission of an annual report on the combined intelligence budget to the President of the United States?

Beyond statutory confirmation of the responsibility of the Director of Central Intelligence to undertake the annual budget review which is already staffed, and annually summarized before the Congressional oversight committees, it is possible that the Intelligence Community staff (IC staff) or a component of it should be formally authorized to obtain access to departmental and other agency intelligence, now a right of the Director of Central Intelligence.[54] Until the IC staff demonstrates a capacity to evaluate scientifically the reliability and value of the intelligence product lines which it reviews,[55] or otherwise demonstrates the importance of statutory authority for particular IC functions or data needs, there is no particular reason to provide that organization a statutory basis. Conversely, any evidence of obstructionism on the part of the intelligence services of the relevant departments, which interferes with the IC staff's performance of essential tasks, could be cause for subsequent reconsideration of this tentative conclusion.[56]

If the Director of Central Intelligence is charged with an annual budget report, this legislative stimulus might encourage attention to the consolidation of departmental intelligence functions and the establishment of shared computer data bases by competitive production shops.[57] Other economies might be similarly encouraged.

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54 Title 50 U.S.C.A. § 403(e).

55 See e.g. T. A. Brown and E. H. Shuford, Quantifying Uncertainty Into Numerical Probabilities for the Reporting of Intelligence, R-1185-ARPA, The Rand Corporation (1973).

56 The view that the Defense Department would not cooperate with the IC staff were it not directed by a military officer, and the overstaffing of the IC staff with military personnel are indicators that some subsequent statutory authority may eventually be required.

57 See the Commission working paper by Robert Young (forthcoming).

From another perspective the issue of encouraging (by statutory language) a searching annual review of the combined intelligence budget is irrelevant, or counterproductive in the sense that it might perpetuate the illusion of regulatory rationality. Intelligence is one of the few governmental goods or services marketed at zero, or close to zero cost. It is a subsidized product of oligopsonist producers, the USIB agencies working in concert as a monopolist, subsidized on the one hand and averting competition on the other hand by saturating the market with free products. By avoiding direct valuation and product choices by consumers,[58] the producers' consortium precludes as a central element in future investment decisions meaningful inferences from market trends. Differences in profiles of alternative consumer markets are repressed, or neglected by standardized products. Marketing skills are neglected, and innovations in media (viewer selection of channels, add-on segments, etc.) are resisted. Producers are perpetually overtasked by dissatisfied customers, and often service too many (non-paying) customers. This theoretical description of regulatory dysfunction is not a full summary of a complex intelligence system.[59] Many consumers are serviced by excellent intelligence products, responsive to demand shifts. Two fundamental problems may persist, despite many instances of outstanding intelligence production: First, in the name of security or responsiveness to policy, the producing agencies may unreasonably raise barriers to market entry, through data compartmentation or failure to submit estimating tasks to the scrutiny of appropriate institutions in industry, university or other non-profit research establishments. Second, consumers may be precluded from exerting quasi-market influences upon production decisions, via budget choices or the setting of production schedules in bodies from which consumers are excluded or under-represented.

58 As with KIQ's (key intelligence questions), mainly targeted against producers, and permitting wide latitude for producer self-selection.

59 Further criticisms and possible quasi-market remedies are raised in W. R. Harris, Memo to R. Macy, "Institutional Mechanisms for Efficient Regulation of Intelligence Markets," Commission doc. 204276 (Jul. 31, 1974), and W. R. Harris, Memo to R. Macy, "Intelligence Markets for Missourian Skeptics," Commission doc. 204695 (Sep. 4, 1974).

Issue #14: Would efforts to expand consumer-producer "intelligence markets" and to eliminate oligopsonist practices of USIC-member agencies require legislative reform?

Efforts to expand consumer-producer market mechanisms would not require legislative reform. A seed-capital account for experimental intelligence product lines, for example, could be established in a producing agency. If a consuming agency were interested, alone or in concert with another agency, in retaining an experimental product line, funding could be included via the budget for the subsequent fiscal year. Direct transfers of funds to the Central Intelligence Agency, "as may be approved" by the Office of Management and Budget, are permissible under the Central Intelligence Agency Act of 1949.[60]

Similarly, efforts to limit unreasonable barriers to competition in the production of analytic studies should not require legislative reform. Under authority of section 102(d)(3) of the National Security Act of 1947, by which the Director of Central Intelligence is charged with protecting intelligence sources and methods, the Director of Central Intelligence has issued at least one Director of Central Intelligence Directive (DCIDs) whereby government contractors -- in industry, in universities, in research institutes -- are precluded from direct utilization of compartmented intelligence. Legitimate security concerns may be channeled by means which restrict direct competition of private experts with intelligence analysts, which encourage sub-contracting via intelligence agencies (tying the data access to oligopsonist control of the market), or which altogether exclude some of the nation's best minds from

60 63 Stat. 208, P.L. 81-110, § 5(a). Under § 5(c) CIA may reimburse other government agencies for services of personnel assigned to CIA (perhaps to produce an experimental product line for a third agency). This statute has been unsuccessfully challenged in the courts. Richardson v. Sokol, 285 F. Supp. 866 (W.D. Pa. 1968), aff'd, 409 F. 2d 1969, cert. denied, 396 U.S. 949 (1969). See also Richardson v. U.S., 465 F. 2d 844 (1972), rev'd, U.S. , 94 S. Ct. 2962, 42 U.S.L.W. 5076 (June 25, 1974) (lack of standing).

analytic challenges they should be addressing. Anticompetitive practices might appropriately be the subject of investigation by the General Accounting Office, but corrective legislation should not be required.

§ 5 PROTECTION OF FOREIGN INTELLIGENCE SOURCES AND METHODS FROM UNAUTHORIZED DISCLOSURE

Because over the last eight years this author has been interested in the legal and constitutional aspects of legislation to protect foreign intelligence sources and methods from unauthorized disclosure, this current review of legal issues almost bypassed the intellectual precedent to that subject, namely, are appropriate legal resources being adequately applied to the protection of foreign intelligence sources and methods in their physical state? Interviews with the director and executive secretary of a USIB committee on security, strategic analysts, the assistant national intelligence officer (strategic programs), arms control officials, and others leave me with the impression that (a) there is adequate delegation of responsibility for security of particular collection systems, but not necessarily adequate delegation of responsibility for augmenting the security of the entire package of remote sensing systems; (b) the potential anti-satellite threat is not inconsequential, and the costs of active and passive countermeasures may constitute, over time, a significant portion of the collection budget; (c) opportunities for future arms control agreements which limit threats to satellite systems, or which advance warning of hostile deployments may exist; and (d) dedication of remote sensing systems for utilization by international organizations is a possible mechanism by which to legitimate and expand international community stakes in preservation of satellite systems. Space utilization agreements, related arms control agreements, and dedication of satellite systems [illegible] alternatives to consider.

Issue #15: Should the Commission recommend U.S. participation in multilateral agreements or treaties to protect peaceful remote sensing systems, and to dedicate designated systems as international observation systems under Article 99 of the United Nations Charter?

The particular option of dedicating designated collection systems for U.N. utilization is related to the more general question of whether it is beneficial for the United States to enlarge its support of United Nations informational needs, considered at Issue #5 (pages 13-14). Alternatively, agreements might be negotiated with the Soviet Union and other states with actual or potential anti-satellite capabilities to limit or ban testing of anti-satellite weapons,[61] to establish loiter-free zones in space, or to expand, via specifically protective language, international agreements for non-interference with "national technical means of verification."

Increasingly, among critical forecasts are worldwide projections -- of population, food, fossil fuel supplies, for example -- respecting which meaningful participation in the evaluation of alternative futures may be an essential component in improvement of the forecast result, not necessarily because participation enhances the knowledge of the forecasters (which it sometimes does) but because participation enhances the likelihood of policy reform. Dedication of remote sensing systems, with appropriate financial reimbursement (or credit toward other assessed contributions), has a variety of advantages. Security of remote sensing activities should be enhanced by international data sharing. Not every system need be dedicated, so as to retain a margin of uncertainty, and protection against deception and other violations of arms control treaties.

61 Under the terms of the 1963 limited nuclear test ban treaty, 14 UST 1313, TIAS 5433, 480 UNTS 43, nuclear weapons may not be tested in the atmosphere or in outer space. Under the terms of the 1967 outer space treaty, 18 UST 2410, TIAS 6347, 610 UNTS 205, nuclear weapons or other "weapons of mass destruction" may not be placed into orbit or stationed in outer space. Non-nuclear weapons and limited military activities are not necessarily proscribed.

Issue #16: Should the Commission support enactment of legislation to protect foreign intelligence sources and methods from unauthorized disclosure? [See Appendix 1]

Two sets of concerns respecting the criminal law of national security offenses should be distinguished at the outset: on the one hand, it is widely recognized that the existing espionage statutes are, at best, mystifying and consequently cumbersome vehicles for protection against modern espionage;[62] on the other hand, it is proposed that a gap in criminal coverage of special concern, pertaining to unauthorized disclosure of foreign intelligence sources and methods, deserves special and immediate protection, quite aside from reform of the espionage statutes or the proposed reform of the criminal statutes of the United States. It is the latter subject which is of present concern, and which is explored in Appendix 1, "Introduction to Recent Draft Legislation for the Protection of Foreign Intelligence Sources and Methods from Unauthorized Disclosure, Together with Copies of Draft Legislation and Explanatory Materials."

For at least two reasons a subset of the concerned officials in the Department of Justice preferred to defer consideration of intelligence "sources and methods" legislation until consideration of S. 1400, the proposed Criminal Code Reform Act of 1973: first, it was hoped that new criminal statutes would be consistent with the proposed criminal code, and second, lack of protection of intelligence "sources and methods" was seen as helpful in gaining sympathetic consideration for S. 1400. Because S. 1400 is mired in constitutional, judgmental, and political travails -- not the least of which involve substantial assaults on the traditional rights of the press --

62 Three recent commentaries are of interest: H. W. Bank, "Espionage: The American Judicial Response; An In Depth Analysis of the Espionage Laws and Related Statutes," 21 Amer. U. L. Rev. 329 (1972); L. S. Edmondson, "Espionage in Transnational Law," 5 Vand. J. Trans. L. [illegible] 1 interest, H. Edgar and B. C. Schmidt, Jr., "The Espionage Statutes and Publication of Defense Information," 73 Colum. L. Rev. 929-1087

tying intelligence "sources and methods" legislation to S. 1400 would be of no greater merit than tying a race horse to the hearse in a funeral procession. Those opposed to criminal sanctions for unauthorized disclosure of intelligence sources and methods may commend this course of action.

Recently proposed sources and methods legislation, from the Office of the General Counsel, CIA (Appendix 1, Tab C, January 1974) eventually stimulated a Department of Justice counterproposal (Appendix 1, Tab D, August 1974) which, if for no other reason is commendable in that it does not appear, on its face, to be unconstitutional. For reasons which may have some relationship to the emotive concerns of "national security" and which I do not yet understand, most of the alternative legislative drafts (Appendix 1, Tabs A, B, C, F) reviewed appear so ill-defined, overly broad, or burdened with unconstitutional process (preclusion of a jury trial, preclusion of a public trial) as to be fatally flawed.[63]

The CIA drafts (Appendix 1, Tabs C and F) seek statutory authority for pre-publication injunctive relief, a concept which, because of frequent prior abuse was discarded in favor of post-publication criminal sanctions under the British Official Secrets Act. It is with regret noted that not a single one of the Tabs A through G in Appendix 1 (nor the full prints of S. 1 and S. 1400) makes even a passing reference to the First Amendment of the United States Constitution, an amendment which may not be transgressed by proposed legislation which, at best, skirts around the safeguards of speech and press.

Any CIA-proposed legislation transmitted to the Congress ought to include a direct analysis of the relationship between the proposed legislation and the First Amendment.[64] It is important to distinguish

63 Tab B, the Justice Department's § 1124 from Title I of S. 1400, has at least constitutional possibilities. By seeking to extend the Scarbeck standard (improper classification not a defense) to other than communications with foreign agents, subsequent to enactment of the Freedom of Information Act, drafters of S. 1400 complicate their constitutional defense.

64 See e.g. Note, "Developments in the Law — The National Security Interest and Civil Liberties," 85 HARV. L. Rev. 1130-1326 (1972).

the theoretical underpinnings of injunctive relief by right of contract from injunctive relief by reason of criminal statute. The right to enjoin publication of a book by one in privity of contract with CIA -- a right pioneered by CIA in the Marchetti case[65] -- is dependent, at least implicitly, upon the capacity of a federal employee to waive by contract a portion of that undefined bundle of First Amendment rights.[66] To ask the Congress to waive First Amendment rights by statute is another matter, presumptively unconstitutional. For this, if for no other reason, any CIA legislation transmitted to the Congress ought to explain its constitutional bases.

As expressed by the Supreme Court in Patterson v. Colorado,[67] "The main purpose of the constitutional guarantee of liberty of the press was to prevent all such restraints upon publication as had been practiced by other governments."

Blackstone's Commentaries on the enlargement of common law liberties in the aftermath of crown restraints upon publication suggest a constitutional frailty in any CIA legislation (Tabs C, F) for prior restraint of the press:[68]

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published. Every freeman has an undoubted right to lay whatever sentiments he pleases before the public; to forbid this,

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65 466 F. 2d 1309 (C.A. 4, 1972)(Marchetti I)

66 The failure of Judge Haynsworth's opinion in Marchetti I to explicate the viability of the contract theory is not a satisfactory basis for averting the different origins of injunctive rights. See also, Knopf v. Colby [Marchetti II], 73 Civ.4626-LWP (S.D.N.Y. pending).

67 205 U.S. 454.

68 4 W. Blackstone, Commentaries at 151-153.

is to destroy the freedom of the press: but if he publishes what is improper, mischevious, or illegal, he must take the consequences of his temerity..."

Put bluntly, by the Pennsylvania Assembly in a letter to Governor Robert Morris (on November 11, 1755): "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." If there is a residuum of indiscretion which would surface under criminal sanctions unless smothered by injunctive relief,[69] that is an indiscretion which society should withstand at least as well as standardized censorship of the press.[70]

If there is to be a limited exception to the rule against prior restraint of the press, that exception should allow pre-publication review on the basis of contract stipulations of federal employees or others similarly in privity with the federal government.

If a persistent CIA must have its statutory right to injunctive relief, then to preserve the constitutionality of that relief the statute should not be predicated upon or associated with a criminal sanction. Otherwise, preservation of a prospective defendant's right

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69 "I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion." Letter, Thomas Jefferson to William C. Jarvis, Sep. 28, 1820.

70 "...suppression by a stroke of the pen is more likely to be applied than suppression through criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." T. Emerson, The System of Freedom of Expression, 506 (1970).

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As stated some years ago by Ithiel de Sola Pool:

> "...if intelligence is to escape the hostile aura that now unjustly surrounds it, if American intelligence is to function effectively in an ever more politically participant and equalitarian world, then it has to be reformed. It has to abandon the practices of a closed elitist bureaucracy, assume the ethic of an open scientific enterprise, build its bridges to the people's representatives in the Congress, and build its bridges to the people themselves ...."[79]

The foreign intelligence community of the United States government is in the process of reforming itself, generally in auspicious directions. Whether the pace of reform will suffice, without a personnel transformation, is not readily apparent. Those instruments of reform addressed in this study are derived from legal process or legislative power. They may at times be tangential or irrelevant to more central reforms. Yet there is no more fundamental a reformation than the reestablishment of an ethic of performance which insists upon the faithful execution of foreign intelligence functions in accordance with the constitution and the laws of the United States.

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79 Ithiel de Sola Pool, "International Intelligence and Domestic Politics," in R. H. Blum (ed.), Surveillance and Espionage in a Free Society 272 at 296-7 (1972).

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S. 1, A BILL TO CODIFY, REVISE AND REFORM TITLE 18 OF THE UNITED STATES CODE, 93D CONG., 1ST SESS.

"§2-5B8. Misuse of National Defense Information

"(a) OFFENSE. - A person is guilty of an offense if in a manner harmful to the safety of the United States he:

"(1) knowingly reveals national defense information to a person who is not authorized to receive it;

"(2) is a public servant and with criminal negligence violates a known duty as to custody, care, or disposition of national defense information, or as to reporting an unauthorized removal, delivery, loss, destruction, or compromise of such information;

"(3) knowingly having unauthorized possession of a document or thing containing national defense information, fails to deliver it on demand to a Federal public servant entitled to receive it;

"(4) knowingly communicates, uses, or otherwise makes available to an unauthorized person communications information;

"(5) knowingly uses communications information; or

"(6) knowingly communicates national defense information to an agent or representative of a foreign power or to an officer or member of an organization which is, in fact, defined in section 782(5), title 50, United States Code.

"(b) GRADING. - The offense is a Class C felony * if it is committed in time of war. ** Otherwise it is a Class D felony.

* 5-10 year maximum sentence; see § 1-4B1.
** 3-6 year maximum sentence; see § 1-4B1.

TAB A

S. 1400, CRIMINAL CODE REFORM ACT, 93D CONG., 1ST SESS.

"§ 1124. DISCLOSING CLASSIFIED INFORMATION

"(a) OFFENSE. - A person is guilty of an offense if, being or having been in authorized possession or control of classified information, or having obtained such information as a result of his being or having been a federal public servant, he knowingly communicates such information to a person not authorized to receive it.

"(b) EXCEPTIONS TO LIABILITY AS AN ACCOMPLICE OR CONSPIRATOR. - A person not authorized to receive classified information is not subject to prosecution as an accomplice within the meaning of section 401 for an offense under this section, and is not subject to prosecution for conspiracy to commit an offense under this section.

"(c) DEFENSE. - It is a defense to a prosecution under this section that the information was communicated only to a regularly constituted committee of the Senate or the House of Representatives of the United States, or a joint committee thereof, pursuant to lawful demand.

"(d) DEFENSE PRECLUDED. - It is not a defense to a prosecution under this section that the classified information was improperly classified at the time of its classification or at the time of the offense.

"(e) GRADING. - An offense described in this section is:

"(1) a Class D felony* if the person to whom the information is communicated is an agent of a foreign power;

"(2) a Class E felony** in any other case.

* maximum sentence of 7 years imprisonment, maximum fine $50,000.
** maximum sentence of 3 years imprisonment, maximum fine $25,000.
See §§ 2201, 2301, Title I.

TAB B

TAB C, S 1

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

14 JAN 1974

Honorable Roy L. Ash, Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This submits proposed legislation in accordance with Office of Management and Budget Circular No. A-19, revised. Enclosed are six copies of a draft bill, "To amend the National Security Act of 1947, as amended." Also enclosed are copies of a sectional analysis, a comparison with existing law, cost analysis, and drafts of the letters of transmittal to the President of the Senate and the Speaker of the House of Representatives.

The proposed legislation amends Section 102 of the National Security Act of 1947 by adding a new subsection (g) defining "information relating to intelligence sources and methods" as a separate category of classified information to be accorded statutory recognition and protection similar to that provided "Restricted Data" under the Atomic Energy Act. The proposed law grants the Director of Central Intelligence the authority to issue rules and regulations limiting the dissemination of information related to intelligence sources and methods of collection and provides for a criminal penalty for the disclosure of such information to unauthorized persons and for injunctive relief.

The continued effectiveness of the United States foreign intelligence collection effort is dependent upon the adequate protection of the intelligence sources and methods involved. In recognition of this, Congress, under Section 102(d)(3) of the National Security Act of 1947, made the Director of Central Intelligence responsible for the protection of intelligence sources and methods from unauthorized disclosure. Unfortunately, there is no statutory authority to implement this responsibility. In recent times, serious damage to our foreign intelligence effort has resulted from unauthorized disclosures of information related to intelligence sources and methods. The circumstances of these disclosures precluded punitive criminal action.

In most cases, existing law is ineffective in preventing disclosures of information relating to intelligence sources and methods. Except in cases involving communications intelligence, no criminal action lies against persons disclosing classified information without authorization unless it is furnished to a representative of a foreign power or the disclosure is made with intent to harm the United States or aid a foreign power. It also requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution. Furthermore, prevention of disclosure in order to avoid serious damage to the intelligence collection effort better serves the national interest than punishment after disclosure; however, there is no existing statutory authority for injunctive relief.

The greatest risks of disclosure come from persons who are entrusted with information relating to intelligence sources and methods through a privity of relationship with the U.S. Government. When such persons, without authorization, disclose information to representatives of the public media, it receives wide publication, and, of course, is revealed to the foreign nations which may be the subject of or otherwise involved in the intelligence activities, leading to their termination as well as political or diplomatic difficulties.

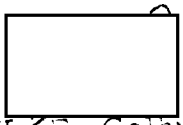
A fully effective security program might require legislation to encompass the willful disclosures of classified information by all persons knowing or having reason to know of its sensitivity. However, in order to limit the free circulation of information in our American society only to the degree essential to the conduct of a national foreign intelligence effort, this legislation proposes that prosecution be provided only for persons who have authorized possession of such information or acquire it through a privity of relationship to the Government. Other persons collaterally involved in any offense would not be subject to prosecution. Further, disclosures to Congress upon lawful demand would be expressly excluded from the provisions of the proposed law.

In order to provide adequate safeguards to an accused, while at the same time preventing damaging disclosures during the course of prosecution, subsection (g)(5) provides for an in camera determination by the court of the reasonableness of the designation for limited distribution of the information upon which prosecution is brought.

Finally, in order to prevent disclosures, subsection (g)(6) provides statutory authority for the enjoinder of threatened acts in violation of the subsection upon a showing by the Director of Central Intelligence that any person is about to commit a violation of the subsection or any rule and regulation issued thereunder.

Your advice is requested as to whether there is any objection to the submission of the proposed legislation to the Congress from the standpoint of the Administration's program.

Sincerely,



STATINTL

W. E. Colby
Director

Enclosures

cc: Chairman and Members of PFIAB
Chairman and Members of NSCIC
Members of USIB

Approved For Release 2004/03/26 : CIA-RDP80M01133A001000090001-8

A BILL

To amend the National Security Act of 1947, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 102 of the National Security Act of 1947, as amended, (50 U.S.C.A 403) is further amended by adding the following new subsection (g):

(g) In order further to implement the proviso of section 102(d)(3) of this Act that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods as defined in paragraph (2) below from unauthorized disclosure--

(1) Whoever, being or having been in duly authorized possession or control of information relating to intelligence sources and methods, or whoever, being or having been an officer or employee of the United States, or member of the Armed Services of the United States, or being or having been a contractor of the United States Government, or an employee of a contractor of the United States Government, and in the course of such relationship becomes possessed of information relating to intelligence sources and methods, knowingly

communicates such information to a person not authorized to receive it shall be fined not more than $10,000 or imprisoned not more than ten years, or both;

(2) For the purposes of this subsection, the term "information relating to intelligence sources and methods" means information relating to sources, methods or techniques concerning foreign intelligence which for reasons of national security or in the interest of the foreign relations of the United States has been specifically designated pursuant to rules and regulations prescribed by the Director of Central Intelligence for limited or restricted dissemination or distribution;

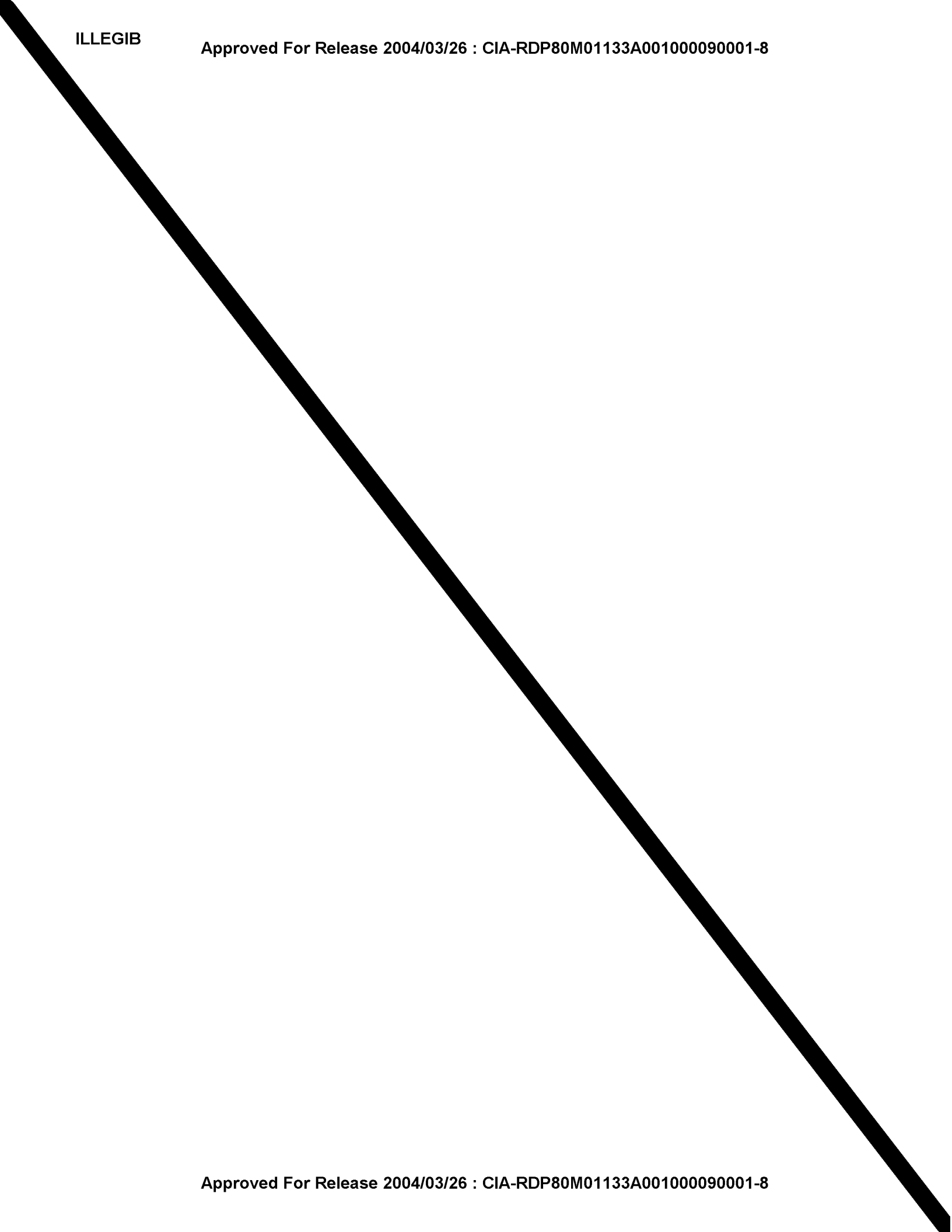
(3) A person not authorized to receive information relating to intelligence sources and methods is not subject to prosecution as an accomplice within the meaning of sections 2 and 3 of Title 18, United States Code, or to prosecution for conspiracy to commit an offense under this subsection. This immunity shall not extend to those persons described in paragraph (1) above who become possessed of information relating to intelligence sources and methods in the course of their relationship with the United States Government;

(4) This subsection shall not prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or the House of Representatives of the United States, or a joint committee thereof;

(5) In any judicial proceeding hereunder, the court may review, in camera, information designated as relating to intelligence sources and methods for the purpose of determining the reasonableness of the designation pursuant to paragraph (2) above and the court shall not invalidate the designation unless it determines that the designation was arbitrary and capricious;

(6) Whenever in the judgment of the Director of Central Intelligence any person has engaged or is about to engage in any acts or practices which constitute, or will constitute, a violation of this subsection, or any rule or regulation issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with the provisions of this subsection or any rule or

regulation issued thereunder, and upon a showing by the Director of Central Intelligence that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.



TAB C, § 3

SECTIONAL ANALYSIS AND EXPLANATION

The draft bill by adding a new subsection (g) to the National Security Act of 1947 further implements a proviso of that Act imposing a duty upon the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure. Where possible, the new subsection is based upon existing provisions of law specifically 18 U.S.C. 798 (relating to communication intelligence) and 42 U.S.C. 2204 et seq. (relating to atomic energy Restricted Data).

Paragraph (1) of the new subsection identifies the special and limited class of individuals having privity of access to the sensitive information defined in paragraph (2) below and proscribes their culpable communication of such information to an unauthorized recipient.

Paragraph (2) of the new subsection defines the special category of information relating to intelligence sources and methods which is subject to the new provision. It also authorizes the Director to provide for the appropriate designation of such information.

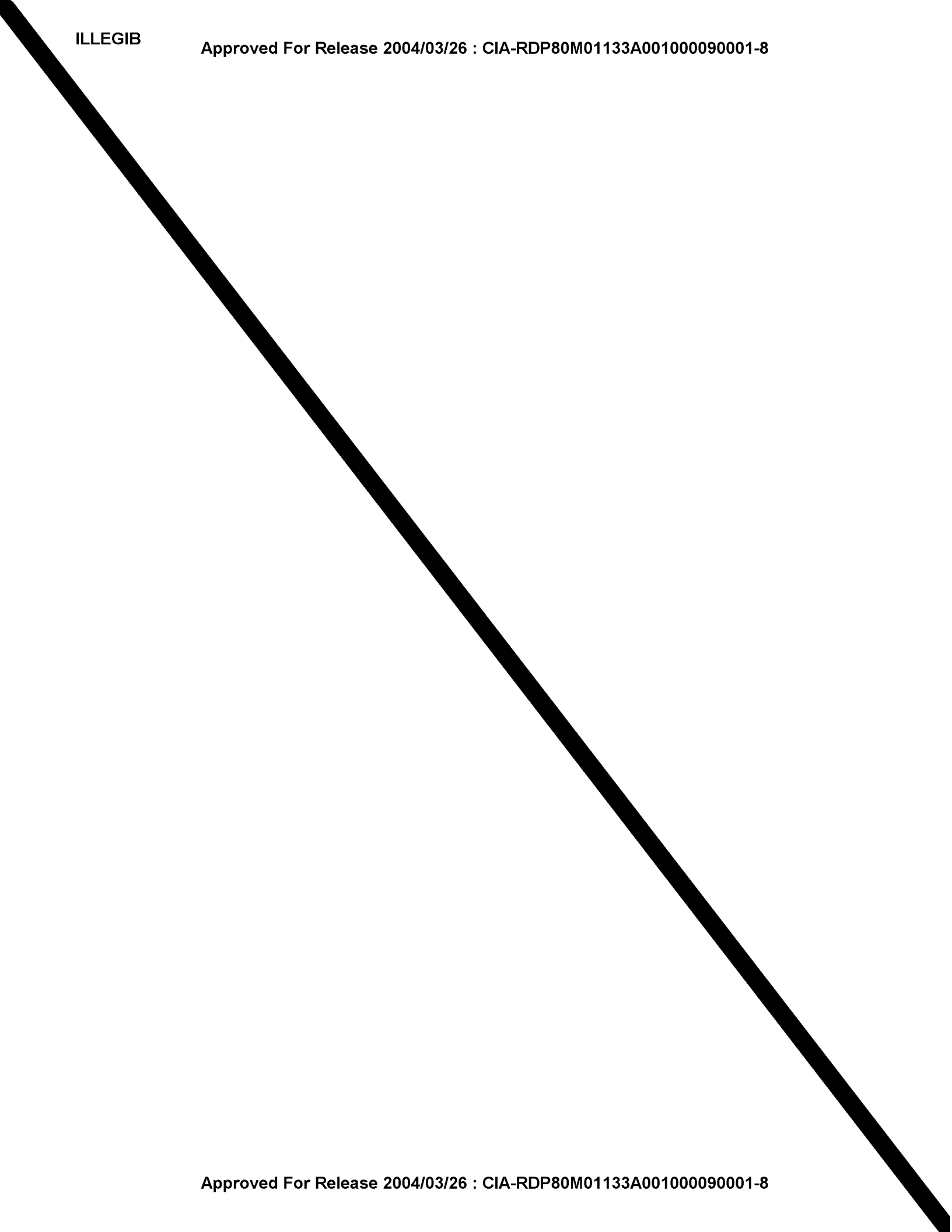
Paragraph (3) of the new subsection assures that only the special and limited class of individuals identified under paragraph (1) above will be subject to prosecution as a result of the violation of the new subsection. This is in keeping with the intent that the new provision penalizes as unlawful only the conduct of those whose access to the designated information is dependent upon understandings arising out of a relationship involving

trust and confidence. Collateral prosecution related to the violation of any other provision of law, however, is not vitiated by this paragraph.

Paragraph (4) of the new subsection makes it clear that the new provision neither inhibits nor impairs, in any way, the lawful communication of any information to the Congress.

Paragraph (5) of the new subsection provides for judicial review of the reasonableness of any designation made pursuant to paragraph (2) above. This will ensure that the designation is not applied arbitrarily or capriciously. It provides that the judicial review will be conducted in camera to preclude the disclosure of sensitive information in open court and avoid aggravating the damage to intelligence sources and methods.

Paragraph (6) of the new subsection permits the Attorney General to petition a court for the injunction of any act which the Director believes will violate any provision of the new subsection. This authority is intended to provide prompt judicial action to avoid damage to the U.S. foreign intelligence effort in circumstances where punitive criminal action alone, being necessarily ex post facto, may be inadequate in achieving the underlying objective of the legislation which is to protect intelligence sources, methods and techniques from unauthorized disclosure.



CHANGES IN EXISTING LAW

Changes in existing law made by the draft bill are shown as follows: existing law in which no change is proposed is shown in roman; new matter is underscored.

NATIONAL SECURITY ACT OF 1947
as amended
(50 U.S.C.A. 403)

* * * * *

TITLE I--COORDINATION FOR NATIONAL SECURITY

* * * * *

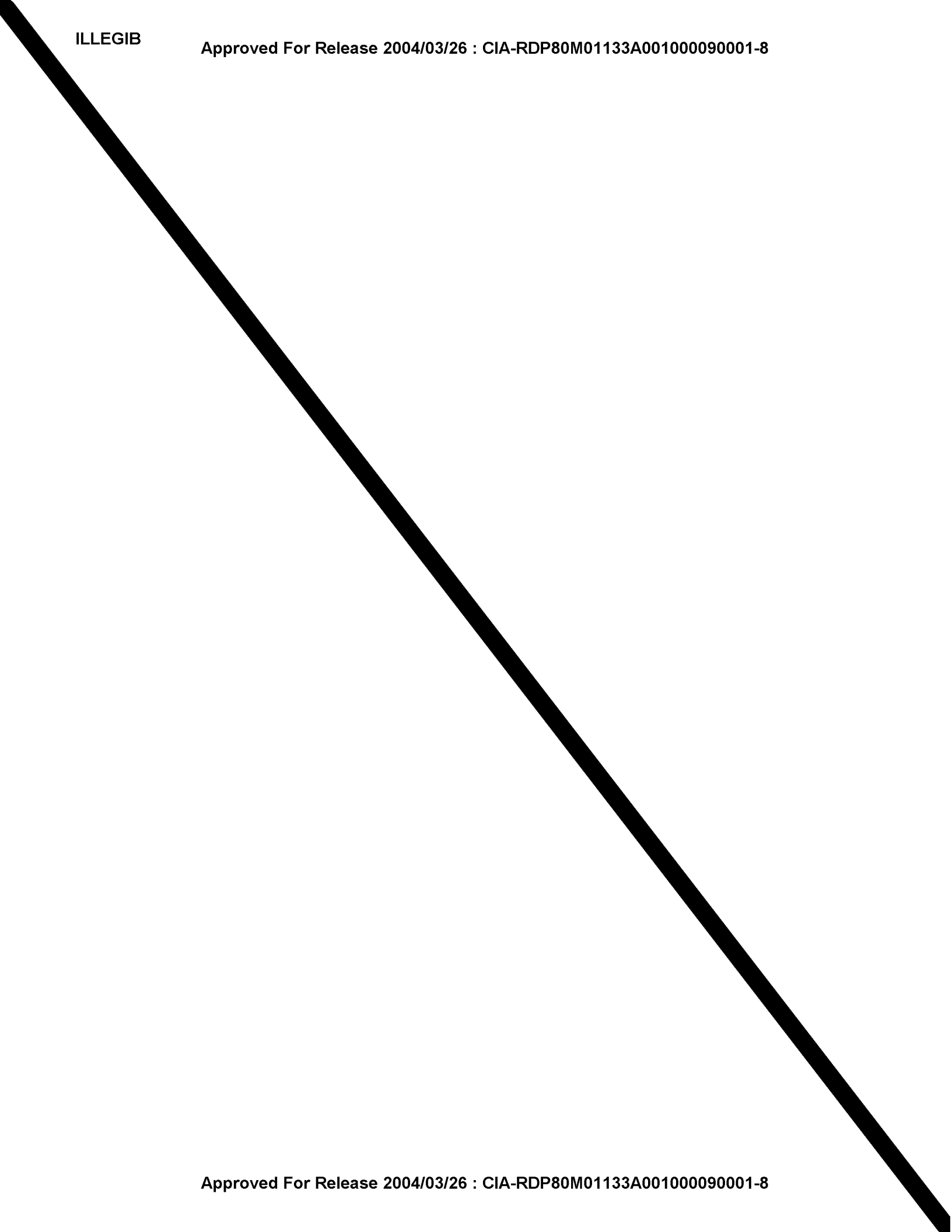
CENTRAL INTELLIGENCE AGENCY

SEC. 102

* * * * *

(g) In order further to implement the proviso of section 102(d)(3) of this Act that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods as defined in paragraph (2) below from unauthorized disclosure--

(1) Whoever, being or having been in duly authorized possession or control of information relating to intelligence sources and methods, or whoever, being or having been an officer or employee of the United States, or member of the Armed Services of the United States, or being or having been a contractor of the United States Government, or an employee of a contractor of the United States Government, and in the course of such relationship becomes possessed of information relating to intelligence sources and methods, knowingly communicates such information to a person not authorized to receive it shall be fined not more than $10,000 or imprisoned not more than ten years, or both;



regulation issued thereunder, and upon a showing by the Director of Central Intelligence that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

Transmittal Letters

TAB C, § 5

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

DRAFT

The Honorable Carl Albert
Speaker of the House of Representatives
Washington, D. C. 20515

The Honorable Gerald R. Ford
President of the Senate
United States Senate
Washington, D. C. 20510

Dear Mr. Speaker:

This letter transmits for the consideration of the Congress a draft bill to amend the National Security Act of 1947, as amended.

Over the years, serious damages to our foreign intelligence effort have resulted from the unauthorized disclosure of classified information related to intelligence sources and methods. In most cases, the sources of these leaks have been persons who were made privy to sensitive information by virtue of their relationship of trust to the United States Government. Deliberate breach of this relationship of trust to the detriment of the United States Government is subject only to partial legal sanction. In most instances prosecution lies only if the offender makes the unauthorized disclosure to a representative of a foreign power or the prosecution must show an intent to harm the U.S. or aid a foreign power. Moreover, in many instances the requirement to reveal in open court the significance of information disclosed is a deterrent to prosecution.

Presently, Section 102(d)(3) of the National Security Act of 1947, as amended, places a responsibility on the Director of Central Intelligence to protect intelligence sources and methods. However no legal sanctions are provided for him to implement this responsibility. The legislation proposed in this draft bill would close this gap to the limited degree necessary to carry out a foreign intelligence program but at the same time give full recognition to our American standards of maximum feasible freedom of information and protection of individual rights.

The proposed legislation grants to the Director of Central Intelligence the authority to issue rules and regulations limiting the dissemination of information related to intelligence sources and methods of collection and provides criminal penalty for the disclosure of such information to unauthorized persons.

The proposed legislation is limited to individuals entrusted with the sensitive information described in the legislation by virtue of their position as officer, employee, contractor, or other special relationship with the U.S. Government. Strictly from the standpoint of protecting the information, this legislation ideally would encompass willful disclosure to unauthorized persons by any person knowing, or having reason to know of its sensitivity. However, our American tradition would not permit a law sufficiently broad to apply to the media or other private citizens. Hence, application of the proposed legislation is limited to those given access to the information by virtue of their relationship to the Government.

In order to provide adequate safeguards to an accused, to prevent damaging disclosures during the course of prosecution, and to prevent prosecution with respect to information unreasonably designated, the legislation provides for in camera review by the court of the information disclosed to review the reasonableness of the designation for limited distribution. The legislation also provides for injunctive relief in those instances where unauthorized disclosure is threatened and serious damage to the intelligence collection effort would result.

We would appreciate early and favorable consideration of the proposed bill. The Office of Management and Budget has advised that there is no objection to presenting the proposed bill to the Congress from the standpoint of the Administration's program.

Sincerely,

W. E. Colby
Director

COST ANALYSIS

This legislation does not involve any measurable costs. Any court costs to the Government would be more than offset by the savings that would result if the legislation deters the compromise of sensitive sources and methods which, if compromised, would require extensive and costly counteractions to mitigate the damage and to offset the advantages to the opposition.

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Approved For Release 2004/03/26 : CIA-RDP80M01133A001000090001-8

October 30, 1974

APPENDIX 2

PROPOSED TRANSFER OF "OTHER FUNCTIONS AND DUTIES RELATING TO INTELLIGENCE . . . AS THE NATIONAL SECURITY COUNCIL MAY FROM TIME TO TIME DIRECT" FROM "THE [CENTRAL INTELLIGENCE] AGENCY, UNDER THE DIRECTION OF THE NATIONAL SECURITY COUNCIL" TO "THE DIRECTOR OF CENTRAL INTELLIGENCE, UNDER THE DIRECTION OF THE NATIONAL SECURITY COUNCIL";

PROPOSED DUTY TO FURNISH TO THE NATIONAL SECURITY COUNCIL AN OPINION AS TO "THE LEGALITY UNDER THE LAWS OF THE UNITED STATES AND THE OBLIGATIONS OF THE UNITED STATES UNDER INTERNATIONAL LAW" PRIOR TO AUTHORIZATION OF ANY "OTHER FUNCTIONS AND DUTIES. . . ."

TITLE I. NATIONAL SECURITY ACT OF 1947

SEC. 102(d) For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council --

- - - - -

~~-- (5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.~~

SEC. 102(e): retitle as SEC. 102(e)(1).

SEC. 102(e)(2) [proposed]

"The Director of Central Intelligence shall by written directive authorize the delegation of such other functions and

duties related to intelligence affecting the national security as the National Security Council may from time to time direct: *Provided, however,* that no authorization under this subsection, whether to the Central Intelligence Agency or otherwise,[1] shall be inconsistent with the limitations of clause (3) of subsection (d)[2]: *Provided, further,* that a legal adviser to the National Security Council shall submit to the National Security Council an opinion with respect to the legality under the laws of the United States and the obligations of the United States under international law prior to the direction or authorization of such other functions and duties by the National Security Council."

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[1] By this amendment the National Security Council would not be restricted in delegation of clandestine service functions and duties only to the Central Intelligence Agency; conversely, neither the National Security Council nor the President whom it advises would be compelled, against their better judgment, to delegate such other functions and duties outside the Central Intelligence Agency.

[2] Title 50 U.S.C.A. Section 102(d)(3) provides, *inter alia,* ". . . That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions. . . ."

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Approved For Release 2004/03/26 : CIA-RDP80M01133A001000090001-8

SUMMARY COMPARISON OF § 1124 (REVISED), S. [blank] [TAB H] WITH § 1124, S. 1400 [TAB B].*

(a) Offense. The only drafting change involves insertion of the words "who is" not authorized to receive [information]. Draft legislation from the Central Intelligence of September 12, 1974 notwithstanding [Tab F], the October 15, 1974 Department of Justice revision of § 1124 [Tab H] applies only to unauthorized disclosure of classified information. Revised § 1124 does not protect information which though not "marked or designated" by statute, executive order, regulation or rule,** constitutes sensitive intelligence, or the disclosure of which would jeopardize intelligence sources or methods.***

(b) Exceptions to Liability as an Accomplice, Conspirator, or Solicitor.

A person not authorized to receive classified information who solicits unauthorized disclosures is, under revised § 1124(b) excepted from liability for conspiracy to commit an offense under revised § 1124(a).

(c) Bar to Prosecution. This subsection is new; no equivalent is found in the prior § 1124 of S. 1400 [Tab B]. Subsection (c) would establish a government agency "responsible for insuring that other government agencies" classify and exempt from classification in accordance with law. Further, subsection (c)(1)(B) would require administrative review by this classification review agency, rather than by the federal courts, de novo, as was required by the Congress (presumably unimpressed by the responsiveness of administrative review by executive agencies) in the after-enacted Freedom of Information Act Amendments of 1974, Public Law 93-502 (November 21, 1974). The requirements of subsection (c)(1) would restrict

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* Summary prepared by William R. Harris, November 29, 1974.

** See Tab H, definition of "classified information," § 1128(b).

*** But see Tab K, §§ 1122, 1123, and 1128(g)(6)-(8), discussed in Tab J.

the affirmative defenses of a defendant under subsection (d), and most importantly, exhaustion of all administrative remedies established under subsection (c)(1) is a condition precedent to relief from subsection (e) which otherwise would preclude the defense that the information was not lawfully subject to classification, by reason of prior official disclosure, arbitrary or capricious classification, absence of classification authority, or for other reasons.

(d) Affirmative Defenses. Subsection (d)(1) retains the narrow standard of immunity for communications to committees of the Congress: the communication must be pursuant to "lawful demand," which presumes Congressional foreknowledge of that which it is appropriate to demand. [See discussion in main text at pp. 37, 38 and Appendix 1, at pp. A8-A10]. Revised subsection (d)(1) does recognize immunity for communications to subcommittees as well as committees of the Congress, a practical addition, which might otherwise have been established by judicial interpretation.

In contrast to the old § 1124(d) [Tab B], revised § 1124(d)(2), read in conjunction with § 1124(e) [Tab H], implicitly concedes the possibility of abusive executive classification practices such as would warrant defense to criminal prosecution by one who had exhausted administrative remedies of classification review.* To qualify for this defense, however, a person must comply with all of the administrative exhaustion remedies under subsection (c)(1), remedies unsatisfactory

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* Revised § 1124(d)(2)(C) and § 1124(e) anticipated Congressional reversal of Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) but not the determination of the Freedom of Information Act Amendments of 1974 [H.R. 12471], P.L. 93-502, Title 5 U.S.C. § 552(b)(1)(A), requiring proper classification, and the committee report, H. Rpt. No. 93-1380, interpreting the Title 5 U.S.C. § 552(b)(3) exemption for intelligence sources and methods as requiring classification.

to the Congress when the Freedom of Information Act and the veto override issues were considered in 1974. Further, under subsection (d)(2)(B), an author who has entered into a contract with a publisher to write a book, or an interviewee on a television talk show who has agreed to accept remuneration, or a former government official paid by a university or foundation to write or teach on governmental affairs, or others under remunerative contracts may be precluded from exercising the affirmative defense of unlawful classification.*

(e) Defense Precluded. Discussed, supra.

(f) Grading. Unchanged.

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* If communications have occurred in the course of working relations under a contract of publication or university research, the author or researcher who has exhausted administrative remedies, but not the judicial review de novo under Title 5 U.S.C. § 552(a)(1975 ed.), upon communicating to a publisher or university sponsor for the purpose of determining whether the expense of judicial review were to be undertaken, could be in criminal jeopardy under revised § 1124. Judicial review could raise Fifth Amendment self-incrimination issues; effort [illegible] Approved For Release 2004/03/26 : CIA-RDP80M01133A001000090001-8 Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); Beacon Theaters v. Westover problem, discussed in the main text, at 36-37, and at Appendix I, at A6-A7.

SUMMARY REVIEW OF SUBCHAPTER C -- ESPIONAGE AND RELATED OFFENSES, UNDER DEPARTMENT OF JUSTICE REVISIONS TO S. 1400, OCTOBER 15, 1974, S. [blank] IN RELATION TO § 1124 [revised] [TAB H] AND DRAFT LEGISLATION OF THE CENTRAL INTELLIGENCE AGENCY [TAB F].*

The text of Subchapter C ["Espionage and Related Offenses"] of the Department of Justice draft Criminal Justice Codification, Revision, and Reform Act of 1974, S. [blank] is reproduced as the following document, Tab K.

In evaluating whether revised § 1124 of S. [blank] or draft CIA legislation for the protection of intelligence sources and methods is a more suitable working instrument from which to fashion legislation [see Tabs F and H], it is essential to evaluate revised § 1124 [summarized in Tab I] in the context of the other proposed sections of Subchapter C [Tab K]. With respect to the preceding Department of Justice draft, S. 1400, the main text to which this appendix is attached states at pages 33-34:

> "...Because S. 1400 is mired in constitutional, judgmental, and political travails -- not the least of which involve substantial assaults on the traditional rights of the press -- tying intelligence 'sources and methods' legislation to S. 1400 would be of no greater merit than tying a race horse to the hearse in a funeral procession. Those opposed to criminal sanctions for unauthorized disclosure of intelligence sources and methods may commend this course of action."

Between submission of S. 1400 in March 1973 and transmission of revised S. [blank] in October 1974 there has been publication of information on sensitive intelligence sources and methods. Yet this period has also produced evidence of explicitly illegal governmental intelligence operations,** abuses of the "national security" mission,

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* Summary prepared by William R. Harris, November 29, 1974.

** See the main text at 3-4, and the subsequently released report of Attorney General Saxbe on the COINTELPRO activities of the Federal Bureau of Investigation (November 18, 1974).

efforts to utilize foreign intelligence surveillances to avert liability for criminal misconduct,* and efforts to utilize the duty of the Director of Central Intelligence to protect "intelligence sources and methods" for the purpose of obstructing criminal justice.** Evidence from White House tapes released in this period also indicates that procedurally-flawed criminal prosecutions and regulatory proceedings against television networks were considered in the context of their political, rather than their criminal justice or national security impact.

The most striking feature of Subchapter C [Tab K] is its consistency with the old S. 1400. Sweeping application of criminal sanctions in the sector of cherished First Amendment rights of free speech and free press has been only rarely modulated in the revised S. [blank]. Those opposed to criminal sanctions for unauthorized disclosure of intelligence sources and methods may more strongly commend Congressional evaluation of the issue through the vehicle of S. [blank] than through the vehicle of S. 1400. Even the espionage section of the proposed S. [blank] might be wielded against university or journalistic researchers, as evidenced by the following revisions:

§1121 [Espionage] of S. 1400 required "intent that information relating to the national defense be used, or with knowledge that it may be used, to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power," where one knowingly ...(2) obtains or collects such information for a foreign power or with knowledge that it may be communicated to a foreign power."

The revised § 1121 [Espionage] of Tab K eliminates the concept of intent, leaving only the tautology that "national defense information may be used to the prejudice of the safety or interest of the United

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* The so-called McCord defense involved communication of incriminating information on telephone lines believed to have been the subject of government surveillance. See U.S. v. Liddy, et al., ___ F. Supp. ___ (D.D.C. 1973).

** Were Subchapter C of S. [blank] in force in 1972, reporters for The Washington Post might, instead of receiving a Pulitzer prize for the Watergate investigation, have been subjected to prosecution or threat thereof, along with their publishers, under §§ 1122, 1123, and 1128, reproduced in Tab K.

States, or to the advantage of a foreign power," and the knowledge of that fact which may be presumed of most half-educated persons, as a basis for criminal prosecution. Further, § 1121(a)(2) now reads [Tab K], "...obtains or collects such information, knowing that it may be communicated to a foreign power," removed from the prior association with the requirement that the information be collected for a foreign power, a definition which might have aided in the prosecution of the Abel case and other cases where proof of clandestine collection is obtained but without ready proof of communication to an agent of a foreign power. Even a collection of unclassified information on foreign intelligence activities, with intent to publish, could qualify for prosecution under § 1121.*

§ 1122 might still be applied to a journalist who communicates information to his publisher, to be retained as a defense in a libel action, or more directly, against a journalist utilizing leaked defense information in a newspaper article, knowing that neither he nor his publisher nor the publication's readers is technically "authorized" to read the information. § 1123 may also be applied, as with § 1122, to information which is not formally classified.

In short, Subchapter C is an invitation to a donnybrook between governmental institutions concerned about abuses of national security information and the publishing and media industries, and scholars, concerned about abuses of executive power. Compared to this mélange, draft legislation specifically limited to the protection of intelligence sources and methods and specifically focused upon persons in a fiduciary relationship to the federal government appears to be a preferable legislative vehicle to remedy specific statutory failings. [See Tab F, and criticisms in the main text, at page 37].

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* This author is attentive to this point, in part because of opposition by the Office of Public Affairs, CIA, to the author's collection of unclassified publications on intelligence in a bibliography intended for students in the Harvard National Security Policy Seminar, in 1966-1968.

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